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THE SHIP HOLDER BORDEN.

The law has no department into which the interest of romance so largely enters as the admiralty. A certain "freedom of the seas" prevails in the practice under that branch of law which is found nowhere else, and invests it with qualities of peculiar attraction. Some portion of the mariner's proverbial liberality seems to preside in these courts. Inflexible technicalities, if necessary elsewhere, are alien to these tribunals; arbitrary distinctions, shrewd prevarications, and all petty considerations are unknown here, or frowned down. The manifold complexities of other practice have never embarrassed the admiralty, where the bigotry of the law emerges into a generous equity. The laced and bound lawyer breathes here an atmosphere of intelligence, good sense, and lofty justice. His mind is invigorated and his intellect ennobled while he considers the grand questions of the seas, often involving the conflict of laws, and international rights. The law which he expounds and illustrates is not chargeable with the burden of routine and ceremonial, for which Burke pronounced his reproach. The perils of the seas, always evoking the strongest elements of man's nature, preclude all other arguments than those which go to the merits. A liberal genius presides upon the bench, and at the bar; and seldom have honest suitors in these courts either disposition or cause to complain of its decrees.

A case has been recently decided by Judge Sprague in the district court of the United States, for the Massachusetts District, which disclosed the qualities of character that uniformly win our admiration and praise. They were developed by voluntary and inevitable exposures of life; by perils of winds, waves, rocks, quicksands and desert islands; and by the wreck and rescue of fortunes. Prudence, courage, and all the ingenious devices of necessity; patience and fortitude, and the spirit which bears up against a flood of discouragements, finally securing deliverance, — were the elements of this case, which, we are informed, moved the audience of a court room in the course of their recital to tears. After compressing the facts in evidence greatly, we are still obliged to omit many incidents of singular interest. We have space only to give distinct outlines of the narrative, including all the facts upon which the decree of the court was predicated, and add to them that decree.

The ship Holder Borden, of 442 tons, sailed from Fall River in November, 1842, on a whaling voyage to the South Seas and Pacific Ocean; J. J. Pell, master, with thirty-six officers and men. Her cost, (a term used in the whaling service to express the whole value at risk, as the ship leaves the port,) was $40,000. She had been seventeen months out, and successful in taking oil, when, in the night of the 12th April, 1844, the ship struck in lat. 26° 1′ N. lon. 174° 51′ W., near some Maroon Islands not down on the chart. She struck on the weather side of a coral reef; all sails were hove back, and in twenty minutes she was afloat. In ten minutes more she struck again, as they were attempting to get her round, and within about 100 feet of a rock that lay at the surface of the water. She immediately went upon the weather side of this rock. In two hours more she had knocked off her rudder, broke her pintles, &c., with four feet of water in her hold. The boats were got ready, and some bread and water put into them, the officers fearing that a heavy roller with a full tide might come in and open the ship. At daylight the lower hold was full of water, and land was seen about four miles distant. The captain then went on shore to ascertain his position, and what were the chances of rescue. It was a low, sand island, about three miles in circumference, without a tree or shrub upon its whole surface, and surrounded by shoals, rocks, and coral reefs, extending on one side twenty-five miles out. Upon returning to the ship, he ordered the masts cut away, and began to get up water from the hold. They took out the chronometer, various instruments of navigation, charts, &c., with some bedding, and put them into a boat. All that day the ship remained on

an even keel, and they endeavored to get everything possible from between decks before she should fall over. Besides several casks of bread and water, they got up three casks of "slops," (seamen's clothing.) In addition to this, the master, already in contemplation of building a vessel out of the wreck, as the only means of escape from this desert island, got up about 1000 feet of pitch-pine plank. All these things were raised upon deck and left there with a view to take them on shore the next day. About sundown all hands proceeded in two boats to the shore to pass the night. Just after they landed, they saw their ship fall over to the sea and to windward; and discovered the next morning that everything raised the previous day, but one cask of bread, was washed overboard and lost. She lay upon a shelving rock, and in falling over slipped into deep water, so that all but about three feet below her larboard plank-shear was under water. By nailing battens to the deck, they secured a foothold, and saved from between decks three or four light spars, and hooked up from under water a coil or two of rigging, and one or two sails, with an eye to the future vessel. That day the mate and one seaman were left on shore to search for water. They dug for it, and at first found it very brackish, but afterward, in the centre of the island, they found it tolerable. The spars were landed that evening. All the next day was passed in breaking up the ship's solid, outside timbers, a few pieces from the bow, and clearing away the rigging in order to tow the masts which had been cut away, ashore. It now became necessary, as they had saved very little provisions, to begin to work in the lower hold, which was deep under water, to obtain them. There were six South Sea Islanders on board, and two of them were divers. The master bargained with them to dive and hook on to anything they could reach, with the promise of one cask in every hundred recovered, in addition to their wages, and that they should be paid on their arrival at Oahu. The divers went down first in the after hatchway, remaining incredible periods under water, and fastened upon one cask after another. The crew each time hoisted away, but could start nothing. They tried successively, during three days, with thirty-five men, everything accessible in the three hatchways, and could not move one cask an inch, though they straightened their hooks, and broke the falls with their efforts. The master stated in his testimony, "everything was Jacksoned, chocked, and we could not start it." They then began to cut a hole through between decks near the cabin gangway. The lower deck was four feet under water, but they also cut a passage through this. Their only instrument for this work was a single boat spade, like that

which they hurl at whales. They passed this tool from hand to hand for thirty-six hours, employing nearly the whole crew, and keeping the instrument in motion; and at the end of that time had only cut one hole, large enough for the passage of a cask. This being done, in the course of the five subsequent days they removed, by constant application, some two or three casks of bread, 30 barrels salt provisions, and 200 casks of oil. Subsequently, with the same instrument and persevering toil, they cut four other holes through both decks, and raised about 600 barrels oil, which was left floating between decks that it might be safe from loss. Upon reaching the provisions, they rigged a derrick over the main hatch, hoisted out the casks, and rolled them overboard, after being becketed, that is, loops of rope run under their hoops, through which a line was passed to tow them after a boat. In pleasant weather they could take but one raft of from six to twelve barrels to the shore in one day. The beach was soft, like quicksand, and they were obliged to pave the beach with plank for a hundred feet, and roll the casks up this floor from the water, with great difficulty. The casks, when landed, were rolled in tiers, and covered with grass to screen them from the burning sun. About 1400 barrels oil and some provisions were thus landed.

Six days after the disaster, the master put his carpenter and three men to work to construct a schooner, from the spare spars of the Holder Borden, and such of her timbers as they could wedge off and separate from the wreck. It involved much sagacity and patience, and much toil. They manufactured two saws from iron hoops about eight feet long, for sawing the larger timbers, the ship's taffrail, spars, &c. With this rough instrument they split some of the timbers three times, with fatiguing assiduity; and converted the ship's spars and knees into plank and flooring. They took the ship's try-pot, fitted a cover to it, and to this secured a steambox for steaming the plank, to make them bend on to the new vessel. One of the ship's spars was used for the keel, and her mainyard and topmast were reserved for the masts of the schooner. They tore up almost everything accessible in the ship to convert it into plank, for the want of which they suffered greatly. They were obliged to create the first elements of their blacksmithing, having nothing but a half-cask of sea-coal, which they had saved. They burnt several coal-pits, by sinking casks of wood in the sand, and so making charcoal. A forge was provided by filling the half of a large cask with sand, covering it with stones, and rigging the ship's bellows to it. Axes, adz, and augers were then made and used in the ship's building. "I never saw anything like the au-

gers," said the captain, "but they answered our purpose." They made oakum, manufactured calking tools, and calked the schooner inside and out; and painted and pitched her with materials saved from the ship. They had reduced the spars, and for standing rigging they used the unlayed strands of a stream cable For sails they made over the ship's canvass. The schooner was of 37 tons, and 13 feet beam. They got her upon the ways, and began their efforts to launch her in the morning. The soft beach nearly rendered all their efforts fruitless. Every means was applied to facilitate the launch, but in vain, until late in the afternoon, when, with extraordinary effort they forced the schooner into the water, and, with reference to their situation, named her THE HOPE. Immediately on entering the water, she went over plankshear to the water. Additional ballast was taken to a large amount, but it did not right her. After putting on board all the iron they could find, they had resort to the casks of oil for ballast. But the schooner was so light that they could not rig tackle for hoisting it on board. With much toil they put on board about thirty barrels of oil, when the vessel righted. In putting water on board, however, she again went over plankshear to the water, and it was only by a balance of weights on opposite sides of the vessel, that they received their water and provisions on board. With this cargo she seemed to be sufficiently stiff, and the captain, with his crew, leaving eleven men on the island to take care of the oil, with a promise of his speedy return, embarked the same night, and sailed the next morning, after nearly five months passed under a torrid sun, and with incessant toil, upon this desolate island. In twenty-three days they reached Oahu in safety.

After many fruitless efforts to charter a vessel, at a reasonable rate, to run to Pell's Island, (so called by the district judge in honor of the indefatigable master of the Holder Borden,) he bought for and in the name of Nathan Durfee, the brig Delaware, for six thousand dollars, and drew on him for the amount, six thousand six hundred dollars. Having taken in provisions and water, and shipped a crew, he set sail, and in eleven days hove in sight of the island. That night he anchored to the leeward of the island; and the two subsequent days were occupied in working into the reef-broken harbor, as near as possible to the landing, and in the best anchorage, which was about three miles from the shore, where they moored at two anchors. The oil, which had been covered with grass and secured with staves upon the departure of Captain Pell, had been neglected by the men in charge of it; it had been exposed by the wind to the sun, while the thermometer ranged from 82°

at evening to 92° at noon, and on two occasions to 106°. Large quantities, therefore, had been lost by leakage. They now began to raft it to the brig with as much despatch as the weather would permit, the waves sometimes heaving their broken raft upon the beach in spite of their most strenuous exertions, and on some occasions upsetting the boat which was towing it. In the course of twenty-six days they succeeded in getting all the oil on board with severe labor, and often at imminent hazard. On one occasion a new shipwreck had almost prostrated all their hopes, and rendered their labors vain. It occurred in the night, after the master was in his berth, and when about half the oil was on board. He felt the ship strike on a rock while lying at her anchors. Before he could leave his berth and reach the deck, she struck again. He ordered the men immediately to man the windlass; but before it was done, she struck the third time heavily. They hove in ten or fifteen fathoms of chain, and got her clear, and so lay till morning, when the captain sounded out another and safer anchorage further off shore, to which the remaining casks were towed by the jolly boat. After all the cargo was on board, the brig remained wind-bound eight days, and was once near being wrecked in a gale; but was saved by her anchors bringing up against a coral bed. When the sea was smooth they could see the rocks below them, and the coral reefs on every side through the clear water. These reefs ran up in cones nearly to the surface of the sea, and unless in sounding they chanced to drop the lead upon their summits, they deemed the anchorage safe, though contiguous to a reef. They sailed December 14th for Oahu, and on the 15th, discovered off their larboard quarter, the foam of breakers falling over a reef, near which they had unconsciously passed at night, in approaching the island. They arrived at Oahu January 8th, after a hard passage, the brig leaking badly,—about five hundred strokes per hour the whole voyage. On examination, the brig was found to have been saved from sinking only by the sheathing, her oakum being all out of her seams. He repaired and refitted, and sailed for home with a new crew, February 9th. After splitting all the sails and losing the mainyard in a squall, the brig arrived at Fall River, July 8th, 1845, with the oil, and some remnants of the ship Holder Borden.

A libel was filed in admiralty by the master et al., and process *in rem* issued against all that was saved from the Holder Borden. (Mr. Coffin, of New Bedford, appeared as proctor for libellants.) The underwriters upon the Holder Borden and catchings intervened as claimants, having paid as for a total loss, and were heard by Mr. Clifford, of New Bedford. Some of the questions of fact

at issue were referred to Thomas D. Eliot, of New Bedford, as assessor. Upon his return the court heard the arguments, and after deliberation, announced the following opinion. The positions of counsel sufficiently appear from the opinion.

I. Are the officers and crew of the Holder Borden to be deemed salvors, in rescuing from the waves and placing upon the island, the oil and fragments of the vessel?

In the case of the *Neptune*, (1 Hag. 227,) the *Massasoit*, (7 Law Reporter, 522,) and the recently reported case of the *Reliance*, (2 Wm. Rob. 119,) it is decided that, in case of shipwreck, and part of the vessel being saved by the exertions of the crew, they are entitled to wages, but cannot be deemed salvors, unless under very extraordinary circumstances. It is insisted that this case comes within that exception. Immediately upon the disaster, the captain resolved upon building a schooner, as the only means of escaping from the island. He put upon this service as many men as could be employed to advantage, and it took near five months to complete her for sea, during which time the residue of the crew had no other employment than that of saving the oil. The weather was fine, the sea was smooth, and although the service was laborious, it was not attended with danger, or any particular suffering. It is material to keep in mind that this was a whaling voyage, in which the great principle of maritime policy of uniting the interest of the mariner with that of the owner, is adopted in its greatest force. By express contract, the compensation of the mariner is to be only a share of the net proceeds which shall be brought to the hands of the owner. In taking the oil from the wreck, therefore, they were laboring to secure the proceeds of the voyage, upon which their compensation depended, which was enhanced by every barrel ultimately saved. I do not think the circumstances were such as to entitle them to be considered as salvors, for merely placing the remnants of the ship and the oil out of the reach of the waves. The men worked only during the day, not being pressed for time, subsisted upon the provisions of the ship, and acted under the directions of her officers. The captain exhibited great ability, promptness and energy, in the trying and novel circumstances in which he was placed, and all parties concur in paying a deserved tribute to his merit. But the crew had no responsibility but that of obedience to his commands.

II. The next question is, what are the rights of the officers and crew with respect to the *Schooner Hope*, and the property transported in her to Oahu? The remnants of the ship belonged to her owners, but under the circumstances were rightfully used by the

officers and crew in building the schooner. None of the old materials could be made use of in the form in which they were found. All had to be refashioned with infinite labor. The mariners were under no obligation by virtue of their original contract to build this vessel, and the owners of the ship acquired no right from the building of her, their materials used in her construction being found, by the assessor's report, to have been of no value to them. In a whaling voyage the owners are to furnish the ship, and the mariners to perform the labor. If the captain had hired a vessel to transport the property from this island, he would have been entitled to remuneration. If the captain and mariners employ their own vessel, they also are entitled to compensation.

III. The brig purchased at Oahu is to be deemed the property of Dr. Durfee. The purchase was made in his name, the bill of sale given to him alone. He has paid the purchase-money, and although the captain states that he purchased her for the owners of the Holder Borden, whoever they might be, it does not appear that any of the other owners have in any manner ratified his acts, or participated in the purchase. For going from Oahu to the island, which I shall call Pell's Island, and taking from thence the oil, and the few remnants of the ship, the brig was entitled to compensation, and has a lien therefor on the property taken on board and brought to the United States. It appears that the officers and crew of the Delaware have been paid by her owner for their services in going from Oahu to Pell's Island, and taking and conveying her cargo thence to the United States, and are not now to be compensated as salvors in rendering that service. It is found by the assessor that the actual expenses incurred by the owner of the Delaware in saving this property, including the purchase of the brig, and deducting her value at Fall River, was $11,303 12; and he has reported that five per cent. will be a fair rate of insurance. This, I am satisfied from the evidence, would not have induced responsible insurance offices to take the risk. It is the policy of the law to allow to the owners of salving vessels something more than their mere expenses, as an inducement to promptness and energy in saving property, and because any compensation depends entirely upon the contingency of success. For this, including the risk of the brig, I shall allow the sum of $1650, which, added to the expenses above stated, makes an aggregate of $12,953 12.

The assessor has reported that one third of the net proceeds would be a fair compensation to the owners of the Hope, for taking and carrying to Oahu the oil and remnants which were conveyed in that vessel, and that sum, being $755 60, will be allowed to

them accordingly: and I shall decree to Captain Pell, for his peculiar and meritorious services in the extraordinary circumstances in which he was placed, including the purchase of the brig at Oahu, going to Pell's Island, and taking the property thence to the United States, for which he has not been adequately rewarded, the further sum of $200.

The net proceeds of the oil and remnants conveyed by the brig Delaware from Pell's Island, amounted to $17,628 57: deduct $12,953 12, leaves $4675 45. The net proceeds of the oil and remnants conveyed by the Hope, was $2266 80; deduct $755 60 and $200, leaves $1311 20. From the above sums of $4675 45 and 1311 20, will be deducted the costs of the libellants, and the residue will remain to the owners of the Holder Borden, and her officers and crew. So far as they are proceeds of the remnant of the ship, they belong exclusively to her owners. So far as they are proceeds of the oil, they belong to the owners, officers, and crew of the ship in the proportions prescribed by the shipping articles.

Recent American Decisions.

Supreme Court of the State of New York, January Term, 1847, at Albany.

THE AUBURN AND OWASCO CANAL COMPANY *v.* GEORGE F. LEITCH.

In New York, a general replication to a plea of *nul tiel corporation* is given by statute, (2 R. S. 459, sec. 13,) and in such a replication it is not necessary to set forth the proceedings by which the corporation was created.

Such a replication ought to conclude with a verification.

A contract to take stock in an incorporated company, and pay for it in instalments, as calls shall be made, is of a very special nature, and must be declared on specially.

General *indebitatus assumpsit* counts on such a contract, are bad on general demurrer.

Where, in an action of assumpsit, the defendant pleaded *non assumpsit* to the whole declaration, and a special plea, and on demurrer to a replication to the special plea, the replication was adjudged good; *held*, that the defendant might attack the declaration, and the declaration being held bad on general demurrer, judgment was given for the defendant.

Whenever, in pleading, a demurrer is reached, it is an invariable rule to give

judgment against the party who committed the first fault in pleading, if the fault be such as would make the pleading bad on general demurrer.

Under this rule, a defendant may attack a declaration, although he has previously pleaded the general issue.

THIS was an action of assumpsit. The declaration contained three counts. The first count was indebitatus assumpsit, for $500, and for moneys payable and due, and owing from the defendant to the plaintiffs, for and in respect of divers, to wit, seventy shares of the capital stock of the plaintiffs, of which the defendant was proprietor and owner, and which he held, by virtue of divers calls made by the directors for the time being, of the plaintiffs, for the said moneys. The second count was indebitatus assumpsit for $500, for and in respect of the defendants having subscribed $7000 for seventy shares of said capital stock, for and towards the making of the Auburn and Owasco Canal, $280 of which sum the defendant had been duly required to pay in pursuance of the act of incorporation of the plaintiffs, at certain times then past, but had neglected to pay. The third count set forth that the defendant was, on the 1st of April, 1844, the proprietor and owner of seventy shares in a certain undertaking mentioned in a certain act, passed March 30, 1832, entitled "An act to incorporate the Auburn and Owasco Canal Company," renewed by an act passed May 3, 1834, and amended by an act passed April 14, 1836, that is to say, a certain undertaking for making and maintaining the Auburn and Owasco Canal; that at a meeting of the board of directors of said company, duly held at the village of Auburn, on the 5th of June, 1843, a call was made on the holders of the capital stock of the company, in pursuance of law, and of the act of incorporation, for $29,000, payable in instalments of two dollars on each share of the stock, the first instalment to be paid to the treasurer of the company, on the 6th of September, then next, and the remaining instalments every six months consecutively, from September 6, 1843, until paid. That due notice of the instalment that fell due September 6, 1843, was given by publishing it in one of the papers of the village of Auburn. That due notice of the instalment that fell due March 6, 1844, was given by publishing it in one of the papers of the village of Auburn, six weeks before the same fell due, and that the defendant, as owner and proprietor of seventy shares in the company became, and was indebted to the plaintiffs in the sum of $140 for the instalment due September 6th, 1843, and in the further sum of $140 for the instalment due March 6th, 1844, and concluded with an *indebitatus assumpsit.*

The defendant pleaded *non assumpsit* and *nul tiel corporation.*

The plaintiffs replied to the second plea averring that they became and were a corporation by virtue of the several acts of March 30, 1832, May 3, 1834, and April 14, 1836. The replication concluded with a verification. The defendant demurred to the replication, and for causes of demurrer assigned, 1. That the plaintiffs did not show how they became a corporation, so that it could be ascertained whether the provisions of the statute mentioned in the replication were complied with so as to vest corporate rights in the plaintiffs, and did not show that the persons claiming to be the Auburn and Owasco Canal Company had complied with the provisions of the several statutes, mentioned in the replication or with any provisions of any of the statutes. 2. That the replication concluded with a verification, and not to the country. The plaintiffs joined in demurrer.

William H. Seward, for the defendant, made the following points, 1st. That the replication was bad because it did not aver that the conditions precedent prescribed in the act mentioned in the replication had been performed. 2d. That it was bad because it concluded with a verification and not to the country. 3d. That if the replication were good the defendant could go back and attack the declaration although he had pleaded *non assumpsit* to the whole of it. 4th. That *indebitatus assumpsit* would not lie in this case, and that therefore all the counts in the declaration were bad. 5th. That an action would lie only against a subscriber for the stock, and that the first and third counts of the declaration were bad because they did not aver that the defendant was such subscriber. 6th. That the 3d count was bad because the defaults mentioned in it were averred to have occurred before the time when it was alleged that the defendant was a stockholder.

B. Davis Noxon, for the plaintiffs, made the following points: 1st. That the general replication to the plea of *nul tiel corporation* was sufficient under the statute. (2 R. S. 459, sec. 13.) 2d. That the replication concluded properly with a verification. *Onondaga Co. Bank* v. *Carr*, (17 Wend. 443.) 3d. That if the replication were good, the defendant having pleaded the general issue to the whole declaration could not fall back upon the declaration, and thus plead and demur to the same count. *Wheeler* v. *Curtis*, (11 Wend. 653); *Dearborn* v. *Kent*, (14 Wend. 183.)

By the Court, Bronson C. J. The Auburn & Owasco Canal Company was incorporated in 1832, and the charter was renewed

in 1834, and amended in 1836. (Stat. 1832, p. 134; 1834, p. 460; and 1836, p. 185.) The first statute created the corporation without the necessity of any preliminary act on the part of the associates (§ 1), but the renewal of the charter in 1834 was upon condition that the directors named in the act of incorporation should meet and organize and open books for the subscription of the stock within one year. The plaintiffs have not averred that those things were done. But this general replication to the plea of *nul tiel corporation* is given by statute, and it is not necessary to set forth the proceedings by which the corporation was created, (2 R. S. 459, sec. 13.) That is matter of evidence on the trial when an issue of fact is joined upon the plea. The replication is sufficient in point of form; and it properly concludes with a verification. *Onondaga Co. Bank* v. *Carr*, (17 Wend. 443.) The defendant may wish to rejoin an ouster or dissolution of the corporation — which he could not do if the replication had concluded to the country. The defendant then insists that the declaration is bad on general demurrer, and in that I think he is right. The first two counts seem to have been taken, with some variations which have not improved them, from precedents of general *indebitatus assumpsit* counts which may be found in Chitty's Pleadings, (Vol. 2, p. 52 – 3; and see p. 390, Ed. of 1837.) No adjudication is cited by Mr. Chitty in favor of that mode of declaring upon a special agreement, and I think none can be found. When a special contract has been completely executed on one side, and nothing remains but the payment of a sum of money on the other, the common counts will be sufficient; as where a man has built a house in pursuance of a special agreement, for which he was to be paid in money, he may in that case declare generally for work, and labor and materials found, and recover the stipulated price in that form. But this is not a case of that description. The plaintiffs do not claim that they have done anything for the defendant; nor that they have furnished, sold, paid, or lent him anything; nor that he has received any money to their use. But they say the defendant has obliged himself by an express contract to pay them certain sums of money; and the general rule is, that when there is an express contract you cannot resort to an implied one, but must set out the contract and show how the defendant is in default. Contracts to take and pay for stock in instalments, as calls shall be made by the company, are of a very special nature; and there is no principle upon which the company can recover without declaring on the contract, showing what in particular the agreement was, and when and how the calls were made. In this case the terms of

the subscription for stock were not prescribed by law, but were to be settled between the company and the subscribers, (charter, sec. 10,) and the plaintiffs must show what terms were agreed on between them and the defendant, and how he has broken his engagement. These are elementary principles in pleading, and we need not refer to books for their support.

The third count is of the same general nature, though it is more special in one respect than the others. It states that a call was made of a certain sum of money, payable in instalments of two dollars upon each share — the first payment to be made on a specified day, and the remaining instalments every six months thereafter until paid; that due notice was given as to two of the instalments, and that the defendant is indebted to the plaintiffs in two sums of $140 each for those two instalments. It is enough to say of this count, as has been said of the other two, that it does not show nor attempt to show what contract the defendant made with the plaintiffs. Indeed, it does not show that any contract was made between the parties. The allegation is, that the defendant at a certain time, was "the proprietor and owner" of seventy shares of stock. That may be true, and yet the defendant may not have subscribed for the stock. He may have bought it in the market, and the charter only gives an action against the subscribers for stock (sec. 10.) Again, the count states that the defendant was proprietor and owner of the stock on the first of April, 1844, and then sets out a call made on the 5th of June, 1843, and a default in payment as to the two instalments for which the action is brought, both defaults occurring before the defendant is alleged to have been a stockholder. There are other defects in the count; or rather it is no count at all.

But it is said that, as the defendant pleaded *non assumpsit* as well as *nul tiel corporation*, he cannot upon this demurrer go back and attack the declaration; and several cases have been cited to sustain that position. But it will be found on examination that the point has never been directly and necessarily adjudged. The doctrine was first started in *Wheeler* v. *Curtis*, (11 Wend. 653,) and was then supposed to result from the well established rule, that the defendant cannot both plead and demur to the same count. It was said that the defendant would not be allowed to do indirectly what he would have no right to do directly. But the question, whether the declaration was good or bad was not decided. The cause went off upon other grounds, and the point in question was not necessarily settled. In *Dearborn* v. *Kent*, (4 Wend. 183,) the *dictum* in the first case was repeated, but it was expressly held that the declara-

tion was sufficient, so that it was wholly unnecessary to inquire whether the defendant was at liberty to make the questions or not. *Russell* v. *Rogers*, (15 Wend. 351,) is the next case, and there it was not decided whether the declaration was good or bad. It was apparently good, so that the point in question did not necessarily arise. In *Miller* v. *Maxwell*, (16 Wend. 9,) this doctrine was mentioned for the last time, and the same learned judge who first stated it, went a great way towards knocking it on the head. In that case, the defendant pleaded the general issue, and two special pleas. The plaintiff demurred to the special pleas, and they were adjudged bad; but the defendant was allowed to go back and attack the declaration, and judgment was given against the plaintiff for the insufficiency of that pleading. Now although the learned judge who delivered the opinion of the court took a distinction between a defect in the declaration, which would not be cured by a verdict, and one which could be reached by a demurrer, the principle of this case is directly opposed to the *dicta* which had preceded it.

It is quite clear that the defendant cannot both plead and demur to the same count, and it is equally clear that at the common law he could not have two pleas to the same count. Indeed, the two things, though stated in different words, are only parts of one common law rule, to wit, that the defendant cannot make two answers to the same pleading. The statute of 4 and 5 Anne, ch. 16, was made to remedy this inconvenience, and it allowed the defendant, with the leave of the court, to plead as many several matters as he should think necessary for his defence. With us, leave of the court is no longer necessary. (2 R. S. 352, § 9.) The statute does not say that the defendant may both plead and demur; and consequently he cannot make two such answers. But he may plead two or more pleas — some of which may terminate in issues of fact to be tried by a jury — while others may result in issues of law to be determined by the court. And whenever we come to a demurrer, whether it be to the plea, replication, rejoinder, or still further onward, the rule is to give judgment against the party who committed the first fault in pleading, if the fault be such as would make the pleading bad on general demurrer. This rule has always prevailed. It was the rule prior to the statute of Anne; and to say that the defendant, because he pleaded two pleas, one of which results in a demurrer, cannot go back and attack the declaration, would be to deprive him of a portion of the privilege which the legislature intended to confer. He cannot plead and demur at the same time, because the common law forbids it. But he may plead two pleas,

and he takes the right with all its legitimate consequences — one of which is, that whenever there comes a demurrer upon either of the two lines of pleading, he may run back upon that line to see which party committed the first fault, and against that party judgment will be rendered.

Aside from the *dicta* in question, there is not a shadow of authority either here or in England, for a different doctrine. Although it seems that no case upon this point has found its way into the books, I well remember that since the decision in *Miller* v. *Maxwell*, (16 Wend. 9,) it has been several times announced from the bench, that, in a case like this, the defendant was at liberty to go back and attack the declaration; and I think the point has been more than once directly decided. I know that the late Mr. Justice Cowen entertained and expressed that opinion, as I did myself, and it is also the opinion of my present associates. I would not lightly overrule so much as a mere *dictum* if it was of the nature and had stood long enough to become a rule of property. But this is not a question of that kind.

The third count in this declaration would, I think, be bad even after verdict. A verdict might cure the first two, but they are bad on general demurrer, and that question the defendant has a right to make on the state of the pleadings.

Judgment for the defendant.

Superior Court, New Hampshire, Grafton and Coos, December Term, 1846.

JOHN WEBSTER *v.* CYRUS ELA AND OTHERS.

Equity; — Specific performance; — Administrator; — Offset.

BILL in Equity, filed in 1837. One Joseph Ela gave the plaintiff his bond, with condition to convey a tract of land upon the payment of two hundred dollars by a day certain, for which sum the plaintiff gave his notes of the same date with the bond. Very soon after the expiration of the time limited for the payment, Joseph Ela died, owing the plaintiff large balances, which he afterwards recovered in an action against the administrator, who exhibited these notes in offset, and had them allowed. This bill was then

brought against the heirs of Joseph Ela and his administrator, who was likewise one of them, to compel them to convey the land. The court held *inter alia*, *First*, that the money was not paid within the time; the balances in the hands of the deceased not having been specifically applied to that purpose. *Secondly*. That although, if Joseph Ela had lived, and afterwards enforced or accepted payment of the notes, he might, perhaps, have been compelled to convey the land, notwithstanding the lapse of time, yet the administrator, by receiving payment after the time, could not bind the heirs to make such conveyance; and that the failure of the plaintiff to pay the notes when they fell due, would have constituted a good defence against paying them at all, of which he might have availed himself in the action at law with the administrator. So the bill was dismissed with costs.[1]

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[1] With the report of this case, there was sent to us by the counsel for the plaintiff, the following comments, which we publish, after some hesitation, inasmuch as it is stated that the point decided was not taken in the argument. A somewhat more extended report of the case would have been more satisfactory.

"Admitting that time was in this instance of the essence of the contract, it may with deference be suggested that immediately upon the execution of the bond, at least until the expiration of the time limited for the payment, the land is in equity taken to have become the plaintiff's; the vendor retaining a lien upon it for the purchase-money. Or, in other words, by the principles of equitable conversion, the land became money, and would, by the English law, upon the decease of the elder Ela, have gone to the executor, who, like the testator, would have had as well his lien upon the land as his personal remedy, through the notes for the payment And the heir would have been decreed, at the suit of the purchaser, to make the legal conveyance. (1 Cruise, 471; Com. Dig. Chancery, 491; 2 P. W. 629)

"The failure of Webster to pay at the day, so far impaired the contract as to leave it at the option of the vendor to abandon it wholly, or by resorting to his remedy upon the notes, to accept the payment after the day — waiving the lapse of time — and so binding himself to convey according to the condition of the bond. For he who receives payment after the day, is estopped to deny that it was seasonably made. And it was to give this mutuality to the contract that the notes were given. The equitable conversion of the property thereupon became contingent upon the exercise of this option on the part of the vendor. And when this option was exercised, it related back to the date of the contract. And so far from its being beyond the executor's authority to bind the heir by the exercise of this option, it seems probable that, by the English law, he would be compelled to do it in behalf of the simple contract-creditors. At least, it has been decided, that where the option is with the purchaser, he shall not collude with the heirs for the relinquishment of his purchase in fraud of that class of claimants. (Leigh & Dalzell on Eq. Conversion, 19, 20, and cases there cited.)

"This merely confirms the more obvious view of the case, that the bond and the notes made the contract mutual. That Webster could not, by refusing to pay at the day, avoid paying at all. That the remedy against him was not restricted to the person of the testator, but, like other personal remedies, passed to the representative of his person. That he, having elected to receive his money after it was

Supreme Court, Vermont, Addison County, January Term, 1846.

NATHAN CLAFLIN *v.* LILLY H. WILCOX.

Trespass on the case may be sustained for an injury to personal property, which is the result merely of the *negligence* of the defendant, although the injury is *immediate*.

In this case the plaintiff alleged, in his declaration, that the defendant so carelessly drove, governed and directed his horse, which he was driving, attached to a sleigh, on the highway, that, by and through the carelessness, negligence and improper conduct of the defendant, the sleigh of the defendant struck the horse of the plaintiff, who was also driving upon the road, with great force, and so injured the horse that he died; and the evidence, on trial, proved the facts substantially as alleged; and it was held, that the plaintiff might sustain his action of trespass on the case.

TRESPASS ON THE CASE. The plaintiff alleged in his declaration, in substance, that, on the twenty-sixth day of February, 1844, the plaintiff's son was driving in the highway, in Hancock, a horse and sleigh belonging to the plaintiff, and the defendant was also driving a horse and sleigh, and that the defendant so carelessly drove, governed and directed his horse and sleigh, that, by and through the carelessness, negligence and improper conduct of the defendant, the defendant's sleigh struck with great force and violence against the plaintiff's horse, and thereby wounded and killed him. Plea, the general issue, and trial by jury, — BENNETT, J., presiding.

On trial the plaintiff introduced testimony, showing, that the defendant was driving his horse, attached to a sleigh, along a public highway in Hancock, in February, 1844, and that the plaintiff's sons, Mabens Claflin and Nathan L. Claflin, were each driving a horse and sleigh, belonging to the plaintiff, along the same highway, in an opposite direction to that the defendant was pursuing, Mabens Claflin being before Nathan L.; that, before Mabens and the defendant met, each turned out sufficiently to pass without any collision; that Nathan L. Claflin was about two rods behind Ma-

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due, is estopped to deny it was paid when due, and that the plaintiff has therefore paid his money and is entitled to the land.

"The intestate retaining the notes till his decease, transmitted to his administrator this power over a portion of his real estate. And if in England, the heir who is disinherited shall not call it in question, *a fortiori* shall he be here estopped by an act of the administrator for his own benefit, and whose fruits are in his own pocket."

bens, and the horse he drove was standing still, at the time Mabens met the defendant; that just as the head of the defendant's horse passed the back of the sleigh, in which Mabens was sitting, the defendant's horse turned in upon the sleigh, so as to catch the thill of the defendant's sleigh into the cloak of a young boy, who was riding with Mabens, by which the boy was dragged over the back of the sleigh and thrown on to the horse and then on to the ground, and the defendant's horse rushed across the road and struck the off thill of the defendant's sleigh against the breast of the plaintiff's horse, which Nathan L. Claflin was driving, so violently, that the thill penetrated the breast of the horse and wounded him, so that he died immediately.

The counsel for the defendant insisted, that the facts proved showed that the plaintiff's remedy should have been by action of trespass, and requested the court to direct the jury to return a verdict for the defendant for this reason; but the court declined so doing. The jury returned a verdict for the plaintiff; and the defendant then filed a motion in arrest of judgment, for insufficiency of the declaration; but the court overruled the motion and rendered judgment for the plaintiff. Exceptions by defendant.

E. D. Barber, for the defendant. This action is, in form, case. We contend, that it should have been trespass. The general rule, which is laid down in all elementary works, for determining whether the action should be trespass, or case, is this; — If the injury be occasioned by the act of the defendant at the time, or the defendant be the immediate cause of the injury, and the injury result from force directly consequent upon his act, trespass *vi et armis* is the proper remedy; but if the injury is not direct and immediate on the act done, but is consequential only, the remedy is by action on the case. The form of action cannot be determined by the fact, whether the act was lawful, or unlawful, nor by the amount of force accompanying it, nor whether it was done wilfully, or negligently; for if these circumstances determine the form of the action, they become the *gist* of the action, and the action is sustained, or fails, according as these facts are determined, whatever may be the amount and character of the injury. *Case et al.* v. *Marks*, (3 Ohio, 305); 2 Hammond, 169. Nor is there any ground, in principle, for the doctrine, which has been raised in some of the cases, that, though the injury may be immediate on the act of the defendant, the plaintiff may waive the immediate injury and claim those damages, only, which are the consequences of the injury. *Hensworth* v. *Fowkes*, (4 B. & Ad. 449); 24 E. C. L. 99; 3 Ohio, 305. There

are several classes of cases, which seem to militate against the principles above stated, and yet are consistent with them. 1. Cases arising upon water, by the collision of vessels, where there is force, but the act may not be the direct and immediate cause of the injury, and when the force results from the operation of the winds and waves and is consequential upon the act. *Ogle* v. *Barnes*, (8 T. R. 188.) 2. When the act complained of is the act of a servant, or when the question has arisen upon a motion in arrest of judgment — from which it could not be determined, whether it was the act of the defendant, or of a servant. *Morley* v. *Gaisford*, (2 H. Bl. 442); *Huggett* v. *Montgomery*, (5 B. & P. 446); *McManus* v. *Crickett*, (1 East, 106); *Savignac* v. *Roome*, (6 T. R. 125); *Bowcher* v. *Noidstrom*, (1 Taunt. 568); *Moreton* v. *Hardern et. al.* (4 B. & C. 224); *Ogle* v. *Barnes*, (8 T. R. 188.) 3. When the ground of the action is mere non-feasance, or it does not appear from the case, but what it might have been non-feasance. *Turner* v. *Hawkins*, (B. & P. 472); *Rogers* v. *Imbleton*, (5 B. & P. 117.) But we contend, that, when it appears, from the case, that the defendant himself was present, and that his own act was the cause of the injury, that the injury was forcible and *immediately* consequent upon the act, and that the damage sought to be recovered is the result of this forcible injury, involved in the act at the time of its taking place, the action must be trespass *vi et armis*, whether the act be negligent, or wilful. *Scott* v. *Shepherd*, (2 W. Bl. 892); Selw. N. P. 454; 1 Sw. Dig. 540; *Leame* v. *Bray*, (3 East, 593); *Day* v. *Edwards*, (5 T. R. 648); *Covell* v. *Laming*, (1 Camp. 497); 2 Camp. 465; *Savignac* v. *Roome*, (6 T. R. 125); *Haward* v. *Bankes*, (2 Burr. 1114); *Gates* v. *Miles*, (3 Conn. 64); *Barnes* v. *Hurd*, (11 Mass. 57); *Cole* v. *Fisher*, (Ib. 137); *Case et al.* v. *Macks*, (3 Ohio, 305); *Percival* v. *Hickey*, (18 Johns. 257); 2 Chit. Pl. 281, n. *k*; 1 Smith's Leading Cases, 327–330; *Guille* v. *Swan*, (19 Johns. 381.)

There are cases, in which the principle has been adopted, that, where there is *negligence* and also *force*, the negligence may be made the *gist* of the action, and case may be maintained. *Blin* v. *Campbell*, (14 Johns. 432); *Williams* v. *Holland*, (10 Bing. 112.) This doctrine may be sound, perhaps, if consequential damages are claimed in the action, but is irreconcilable with first principles and the whole current of authorities, if the damage claimed is that which is involved in the act of force complained of. But the very principle, which lies at the foundation of the two actions, must be conclusive, it would seem, in deciding this question. *Trespass* is a writ at common law, and of course, is a remedy for all injuries

committed with force, and which are immediately consequent upon the act of the party complained of. *Case* is an extraordinary and judicial writ, and is a special action to recover for special damages, not recoverable by the ordinary remedy of trespass, and, in principle, unless it counts on special damages, which are not recoverable by the ordinary remedy, the action is misconceived. Selw. N. P. 460, and note 5. *Ashby* v. *White*, (1 Ld. Raym. 937); *Pasley* v. *Freeman*, (3 T. R. 51); 2 Wils. 146; Smith's Lead. Cas. 330; Com. Dig. tit. Action, 236; *Avery* v. *Ray*, (1 Mass. 12.)

Linsley and *Wicker*, for the plaintiff. Courts have found it very easy to lay down the rule, that trespass is the proper remedy, when the injury is forcible and immediate; and case, where it is consequential. But the application of the rule has been little aided by definitions. The greatest difficulty has arisen in relation to injuries to vessels, and from animals attached to vehicles. Several cases of the highest authority, where case has been sustained, are almost identical with the one at bar. In *Day* v. *Edwards*, (5 T. R. 648, the declaration alleged, that the defendant "so furiously, negligently and improperly drove his cart," &c., and it was held, that the action should have been trespass; and in *Ogle* v. *Barnes*, (8 T. R. 188,) decided by the same court, it was held, that case was the proper remedy, where the defendants so negligently and carelessly steered their vessel, that it run against the plaintiff's vessel. The case of *Gates* v. *Miller* is relied on by the defendant. It appeared, that while the plaintiff's and defendant's vessels were sailing in a direction, that neither would have touched the other, the defendant directed the course of his vessel to be changed and ran her into the plaintiff's vessel. The court decided, that the action should have been trespass; but they said, "If it had appeared, that the winds and waves baffled the defendant's purpose and counteracted his efforts, the motion would have presented a very different case," &c. *Turner* v. *Hawkins*, (1 B. & P. 472); *Blin* v. *Campbell*, (14 Johns. 432); *Rogers* v. *Imbleton*, (5 B. & P. 117); 1 Smith's Lead. Cas. 210; *Moreton* v. *Hardern et al.* (10 E. C. L. 316); *Williams* v. *Holland*, (25 E. C. L. 50.) If trespass would have been the more appropriate form of action, still the motion in arrest of judgment should not prevail, and the case of *Ogle* v. *Barnes*, is full authority on this point. 1 Chit. Pl. 374; 3 Stark. Ev. 982; 8 T. R. 188.

The opinion of the court was delivered by

Redfield, J. The only question in the present case is, whether

the plaintiff can sustain this action upon the case for an *immediate* injury, caused by the *negligent driving*, by the defendant, of his own horse. There certainly is not the fullest coincidence in the cases upon this subject, nor is it easy, I think, to reconcile all the cases on the subject, either English or American, which are to be found in the books. This case, however, might be decided by what is said by the court in *Slater* v. *Baker*, (2 Wils. 362,) — "That the plaintiff ought to receive a satisfaction for the injury, seems to be admitted; but then it is said, that the defendants ought to have been charged as trespassers *vi et armis; the court will not look with eagle's eyes, to see whether the evidence applies exactly to the case or not*, when they can see the plaintiff has obtained a verdict for such damages, as he deserves; they will establish such verdict, *if it be possible*." Perhaps the rule of practical common sense, of making, as far as can well be done, the mere form of the action bend to the substantial justice of the case, is here stated somewhat boldly, but it sounds well, and will not be found to vary substantially from the practice of most modern courts.

But we have no doubt the present case comes fully within the most sensible, most numerous and longest standing and most approved authorities upon the subject. It may be true, perhaps, that an action of trespass might have been sustained in the present case; but clearly, we think, that is not the only remedy. Trespass and case are concurrent remedies for a great many injuries. Where personal chattels are *taken* from the owner and *converted into money*, he may sue the person *taking*, either in trespass or trover, (which is trespass on the case,) or he may bring assumpsit for the money. For criminal conversation with the wife, or seduction of the daughter, or servant, or an assault and battery upon a child, or servant, either trespass, or case, will lie, at the election of the husband, parent, or master. And so for many other injuries, which might be named, the party injured has an election of remedies. The rule, we think, is the same in a certain class of cases, involving the same, or a similar subject-matter with the present action.

If the injury be *wilful* and committed by the *defendant himself*, and the injury *immediate*, the action *must* be trespass. Almost all the cases concur in this. So, too, if the injury is *immediate*, and the defendant *positively does* any act *producing*, or increasing, the injury, trespass is the appropriate remedy. But when the only fault of the defendant consists in *negligence*, is a mere *non-feasance*, although the injury is *immediate*, the appropriate remedy is case. The cases will be found, we think, to sustain this view. But some cases go so far, as to affirm, that, in the last class of cases, and in

all cases, where the injury is *immediate*, the *proper* action, perhaps the *only* action is *trespass*. *Leame* v. *Bray*, (3 East, 593,) goes upon this ground, but has been often doubted, and seems to me to have been decided rather too much upon the ground quoted from *Slater* v. *Baker*, to be regarded as much authority *for other cases*. It is well enough to decide a case upon its own peculiar circumstances, especially when they present a strong equity, as is very often done in the English courts, — much oftener, it would seem, than in this country; but, then, in Westminster Hall such a case is never regarded as of much account, in determining any other case. The courts there, as all courts ought to do, seem to fasten more upon the general current of the authorities, the principle evolved from all the cases, so to speak, than upon the peculiar facts of any particular case. Thus it will be found, that, in that country, the case of *Leame* v. *Bray* has not been much regarded, if we except, perhaps, one or two *nisi prius* cases, decided, soon after that case, by Lord Ellenborough, — who doubtless considered himself so far the author of the decision in *Leame* v. *Bray*, that he was unwilling to act the part of an unnatural parent, by abandoning it to its fate, without an effort to sustain it. *Covell* v. *Laming*, (1 Camp. 497); *Lotan* v. *Cross*, (2 Camp. 465.) With these exceptions, I do not find, that any English court or judge, has undertaken much to vindicate the case of *Leame* v. *Bray*, or to rescue it from that oblivious disregard, into which it has been constantly falling in that country.

But the effort, in this country, to reconcile all the cases upon that subject, and, in so doing, to follow the case of *Leame* v. *Bray*, seems to us to have made rather sad work in one or two instances, at least. *Gates* v. *Miles*, (3 Conn. 65,) is, indeed, ably argued by the court, and the most is made of the facts in the case, to *defeat* the action, but to *sustain* the verdict below; but it seems to us, that, without the support of *Leame* v. *Bray*, and the *nisi prius* cases cited above, this case of *Gates* v. *Miles*, might quite as well have been decided for the plaintiff. It is very probable, that the fact, that the action of trespass was clearly barred by the statute of limitations, induced the court to deny the remedy by an action upon the case. There might have been other facts in the case, which do not appear in the report. The fact, too, that the collision in that case, occurred by the *positive* act of the defendant, or of his servant, acting in his presence and under his express orders, distinguishes it from the case now before the court, and from the rule, which we have stated above. The case of *Case et al.* v. *Marks*, (3 Ohio, 305,) [2 Hammond, 169,] is a case not reconcilable with the rule laid

down above, nor with any well considered case, unless it be that of *Leame* v. *Bray*, and is opposed, as we think, to the general current of authority on the subject of water navigation. In the case of *Day* v. *Edwards*, (5 T. R. 648,) stress is laid upon the allegation, that the defendant drove *furiously* upon the plaintiff's carriage, as showing that the injury was done, not only by a *positive* agency of the defendant, but that it was *wilful* and *immediate*. *Savignac* v. *Roome*, (6 T. R. 125,) is a case against the master for the wilful act of the servant, and was decided upon the ground, that the master is not liable at all for the *wilful* act of his servant, unless it was done by his *direction* or *consent*, and, in that case, that he is liable to the same action with the servant, — which must be trespass, the act being both *positive* and *wilful*, and the injury *immediate*.

The case of *Ogle* v. *Barnes*, (8 T. R. 188,) decides, that "If A. *wilfully* run his vessel against B.'s and damage ensue, B. may bring *trespass;* but, if A. so *negligently* steer his vessel, that it run foul of B.'s, then case is the proper action." This case seems fully to justify the present action. *Tripe* v. *Potter*, cited in the opinion in this case and in 6 T. R. 128, goes upon the same ground. *Rogers* v. *Imbleton*, (5 B. & P. 117,) is almost identical with the case now before us, and the court held, without doubt, that case is the proper remedy, and wholly disregard the case of *Leame* v. *Bray*, as an authority. *Huggett* v. *Montgomery*, (5 B. & P. 446,) is similar, in principle, to the case of *Savignac* v. *Roome*, cited above. *Morley* v. *Gaisford*, (2 H. Bl. 442,) is also a similar case. The cases all agree, I believe, that no action of trespass can be maintained against the master, for any act of his servant, unless the servant acts by his consent, either express or implied, and that, if the master, in other cases, is liable at all for the *wilful* acts of his servant, which causes immediate injury to the plaintiff, the action must be trespass on the case against the master, although trespass lies against the servant. The case of *Turner* v. *Hawkins*, (1 B. & P. 472,) is a case decided in the exchequer chamber, and seems to us to put this subject upon its true ground, that, where the wrong complained of is a mere *non-feasance*, the appropriate remedy is case, but that trespass will also lie, perhaps, where the injury is *immediate*. *Moreton* v. *Hardern et al.* (4 B. & C. 223,) [10 E. C. L. 316,] is a case fully sustaining the same view, and withal, a very elaborate and well considered case. It decides, that case is the proper remedy for an injury *resulting from the defendant's own negligence* in driving his coach upon the plaintiff's carriage, although the injury is *immediate*. Opinion of LITTLEDALE, J. See,

also, here, the review of all the cases, upon this subject, by Bayley, J. *Williams* v. *Holland*, (10 Bing. 112,) [25 E. C. L. 50,] fully affirms the view we have just taken of *Moreton* v. *Hardern et al.*, and is a case learnedly and ably discussed, both by court and counsel; and it decides, "that, when injury is occasioned by the carelessness and negligence of the defendant, the plaintiff is at liberty to bring an action on the case, notwithstanding the act be *immediate*, so long as it is not a wilful act." We have thus examined the English cases as far, perhaps, as will be profitable. It will be seen, that they fully justify the present action.

The American cases upon this subject are numerous, and many of them, and those most reliable, as a fair exposition of the common law, seem to us to sustain the view we have here taken of the law upon this subject. They will be found extensively collected and collated in a note to *Scott* v. *Shepherd*, (1 Smith's Leading Cases, 329.)

Judgment affirmed.

Municipal Court of the City of Boston, Massachusetts, July, 1847.

Commonwealth *v.* Elizur Wright.

The Law of Libel in Massachusetts.

This was an indictment for libel, founded upon a publication in the Daily Chronotype, of which paper the defendant was editor and proprietor, charging Moses Clark, one of the jurors on the trial of the case of *Tubbs* v. *Tukey*, which was a suit for arrest and false imprisonment in the court of common pleas for Suffolk county, with being influenced to give a large verdict against the city marshal, the defendant, on account of being himself the holder of a mortgage on a gambling establishment, and also with having played a game of draughts in the jury-room, to determine the amount of the verdict. The defendant employed no counsel at the trial, but argued his own cause. The charge to the jury was delivered by Wells, C. J., and was as follows: —

Gentlemen of the Jury,

The question before you is an indictment for a libel. Perhaps

you will think, when you come to pass upon the case, that it is rather a settled question; but the discussion has taken so wide a range, that it may be expedient for me to go to a somewhat greater extent into the various considerations, than would have otherwise been necessary.

In the first place, gentlemen, there arises a question as regards your province in the decision of the question before you. Elaborate arguments have been made to you about the law of libel, and an argument was addressed to you about what was the law of libel in this case, and other criminal cases. It is important, gentlemen, for you to understand this question aright. The practice of addressing juries upon questions of law, has existed for a long time in this commonwealth, and I do not know but always. The practice has existed so long that the court has not thought proper to disturb it; but recently this question has received the most serious consideration of the court. They held the question in advisement for a year or more, and after the fullest consideration came to this decision; — that it is the duty of the jury to be governed by the instruction of the court in matters of law, in all criminal cases, as well as in civil cases. Such is your duty, gentlemen, and I will not take up any time in discussing the question whether you ought to perform your duty or not. I state it to you as the law of the land, that whatever instruction the court give you in regard to the law, in this case, you are bound by, as you would discharge your duty properly. You are bound to take the instructions of the court in matters of law, and to be governed entirely by those instructions in rendering your verdict. In matters of fact it is otherwise. Whether a particular fact is true; what inference you will draw from the evidence given you, when called upon to infer a fact from certain testimony; here your province is exclusive. It is no part of the duty of the court to say whether a fact is proved or not, or to say what inference shall be drawn from testimony tending to establish the existence of a fact. If the court should intimate their opinion, it neither binds you, nor warrants you in being governed by it. Over matters of fact, juries have exclusive control, and the court exclusive control over matters of law.

By keeping up this distinction we attain the highest ends attained by judicial trials. If the judge mistakes the law, the party is not deprived of redress. He may complain of that mistake, and all may be settled and corrected by the deliberate sanction of a tribunal composed of the ablest judicial minds in the commonwealth, of men placed in the situation above all others most favorable for a correct and impartial decision. Without this favor there would be

no law. Each jury would make a law for itself, and no man would know when he was exposed to punishment, or whether he was protected from injury. I will not, therefore, gentlemen, go over this ground any further than to say that so far as the court instructs you in matters of law, you will be bound by their decision, and in matters of fact, you will draw your own inference from the evidence placed before you.

It has been argued by the defendant, that there is in this commonwealth no law making a man punishable for the publication of a libel in the public press. The court instruct you, gentlemen, that this is not correct doctrine. There is a law punishing a person who is guilty of the publication of a libel, and that law extends as well to the publishers of a press as to persons writing as private individuals, with certain limitations. There is a provision in the constitution, gentlemen, which I will read to you, which probably gave occasion to this idea. "The liberty of the press is essential to the security of freedom in a state; it ought not, therefore, to be restrained in this commonwealth." What is the meaning of the phrase, "the liberty of the press ought not to be restrained?" It has received a consideration by the highest tribunals of our land, and the meaning of that provision is definitely settled. It applies to what is called the censorship of the press, existing in despotic governments; and in other governments at this moment, as in the city of Mexico. Persons having the care of the public presses, are obliged to submit whatever they intend to publish to the scrutiny of the public authorities, before it is published at all, and nothing can be published without the previous sanction of the public authorities. In some of the newspapers of Paris you may find large blanks, indicating the articles forbidden to be published. This is the meaning of the expression that "the liberty of the press shall not be restrained." This is the meaning which has been settled. There shall be no power in the government to say that an individual shall not publish what he chooses, but it never was the meaning of the provision that a person should not be answerable for what he does publish, provided he invades the rights of others by such publication. It would be, perhaps, a reproach to our laws were it otherwise. We hedge around property with guards of every kind, to punish with the utmost severity those who invade the rights of property. It would be singular if that reputation, which is dearer than property, were open to the attack of any one. A poor man cannot be punished to any extent, in the way of imprisonment in a civil action. If there were no law punishing libels as criminal, a person destitute of property might libel with impunity, or next to impunity.

The definition of a libel, gentlemen, has been given long ago, and passing over those cases where there is an imputation of crime, our courts have settled, that a libel is a malicious publication, expressed either in printing or writing, or by signs and pictures, tending either to blacken the reputation of one dead, or the reputation of one who is alive, and expose him to public hatred, contempt or ridicule. *Commonwealth* v. *Clap*, (4 Mass. Rep. 163.) Whoever, therefore, maliciously publishes a charge against another, exposing him to public hatred, contempt, or ridicule, and much more charging him with any serious offence or crime, is guilty of a libel. You will find that the word malicious is used in this case, and some have supposed that by this word is meant malice against the individual. Malice has a legal and technical as well as a popular sense. That is stated to be malice where the party intends to injure another. The words are used in the alternative. The malice of a publication is the intention to injure or to defame the reputation of another. Whenever a person makes a publication intending to defame the reputation of another, it is malicious in the eyes of the law.

This definition was adopted before the time of our Revised Statutes, and falsehood, you will notice, is among the items of the definition of a libel. It was a law of this commonwealth until the year 1826, that the truth was no justification for a libel, with certain exceptions. When the question was brought before the courts of this commonwealth, they decided that the law of libel required the courts to say that the truth was not a justification in the matter of libel, and as judges are not makers but mere expounders of the law, they could not give any other decision than they did. The legislature thought that the common law of libel was too harsh, too arbitrary, gave too much power to the judges, and was to a certain extent inconsistent with our free institutions, and consequently, in 1826, passed an act, modifying the law, which act has been incorporated into the Revised Statutes, and is now the law of this commonwealth. It is as follows: — "In every prosecution, for writing or for publishing a libel, the defendant may give in evidence, in his defence upon the trial, the truth of the matter contained in the publication, charged as libellous; provided, that such evidence shall not be deemed a sufficient justification unless it shall be further made to appear on the trial, that the matter charged to be libellous was published with good motives and for justifiable ends." This is a great modification of common law. If a man publishes that which injures another, he is to be treated as a libeller, unless he can give a good reason, well established by proof, that what he

published was true, and that he published it from good motives, and for a justifiable end.

There is another class where the publication may be injurious, at the same time untrue, and at the same time not libellous; and that class of cases may be defined to be this: — where it is the duty of a man to write in relation to another. Wherever the law imposes upon him the duty of speaking, there he is to be protected though he may be mistaken. A person is suspected of being guilty of an offence, and one makes a charge, and alleges that he has been guilty of that offence. He was in the way of his duty, and provided he did it honestly, he is to be protected, though mistaken. A man may be a member of a church, may have a conversation with a brother, and think he deserves church discipline. The result of the investigation may show that the charge was not sustained; still, the person had a call to speak, and is to be protected, unless he has done it dishonestly. Perhaps, gentlemen, if a man offers himself as a candidate for public office, and submits the question of the propriety of his claims, it is the duty of the press to canvass the merits of the person who has thus put himself upon his country for approval or disapproval. I should think, in that case, all that would be required would be to discuss the merits of that candidate with integrity, and if it should happen that charges affecting their fitness for office should be made against them, no action would lie against the individual who had made those charges. There is a duty, in other words, to speak out. There is no duty, however, imposed upon an editor to discuss the question of the merits of the discussion in a grand jury-room, and if an editor chooses to enter into that grand jury-room and charge upon a member improper deliberation, he does it at the peril of going upon the other provision, of proving it to be true, and proving that the publication was from good motives, and for justifiable ends.

You will observe, gentlemen of the jury, that excepting privileged communications, where it is the duty of the person to speak, with that exception, a person who publishes anything against another with the intention of lessening that person in the public estimation, or wounding his feelings, is guilty of a violation of the law, unless he, on his part, does prove these three particulars: first, that the publication was true; second, that it was published from good motives; and third, that it was published for a justifiable end. It must be true, gentlemen. A person who speaks where there is no call of duty for him to speak out, has no right to shelter himself under the statement that he believed it was true — that he did it without any knowledge of its falsehood. He does it at his peril,

and he must see to it, when he does, without call, put an imputation upon another, that he is warranted by the truth in making his charge. But the truth alone is not enough. There are a great many cases where a man might publish the truth against another, and at the same time, if his ends and motives were bad, he is not to be protected. Suppose the case of a man who, struggling with poverty and evil influences, had risen to a place of rank and distinction in the world; and suppose it were true that the parents or relatives of that individual were vile and worthless, and perhaps had suffered upon the gallows, and a person with malicious intent should publish these things in the papers. The truth alone would be no justification, if it was published from a bad motive and for unjustifiable ends. Suppose the individual himself in early life had been guilty of some irregularity, but by a long course of sobriety, industry and integrity, had established his character; and some person, with the view of blasting and destroying him, should undertake to parade these things against him, in order to destroy his standing, the truth would be no justification in that case, because the motives were not good, nor was the end justifiable. The party must not only, therefore, state the truth, but must have good motives. That relates to the integrity of the individual himself. He must believe himself to be doing right. The jury must be satisfied that he thought he was called upon by some sense of duty to sacrifice the reputation or injure the feelings of another, by a publication of this kind.

There is one thing still further: in these days of extraordinary and extreme views on many subjects, a man may justify himself to his own conscience, and yet appear to do wrong to another. Very good men have acted in all good conscience, when doing that which was wrong. When an individual ventures to attack the position and character of another, he must see to it, not only that he is conscientious, but that he has an object in view which will approve itself to the judgment of reasonable men; for he is not to be excused, if the jury think the end which he had in view was not one which could be warranted by reason.

These, gentlemen of the jury, are the principles which will govern you; and in applying these principles, you will take the indictment, and take the publication of the 14th of May, and look them over; and then comes a question of fact for your decision: Was that publication one calculated to injure the reputation and feelings of Mr. Clark? That is a question which you have to try. Did it convey an implication upon him which might wound his feelings,

or affect his standing in society? You will judge of it, gentlemen; it has been so fully discussed that I need not remark on it.

Something has been said of the discussions in the petit jury-room. There is a marked distinction between the two kinds of conduct. Twelve men go out to consider the evidence. The law sends out twelve, and requires them to be unanimous in their verdict. It is impossible that this should be obtained, unless the jury approach the deliberation with a freedom from pride of opinion, with a disposition to hear and weigh well whatever can be said, and, to a certain extent, with a readiness to defer the one to the other in order to come to a result. If each juror insisted upon having everything in his own way; if he should insist that his first impression should be that by which he should abide, it would be impracticable to try cases requiring an unanimity of opinion on the part of the jury. All fair means by which the jurors' minds may be made to meet; all fair comparisons, such as marking round and discussing it afterwards; all those means which can be adopted, the effect of which is that honest men, conscientiously aiming at the discharge of their duty, shall agree where at first there was a disagreement, are highly commendable and should be observed by juries. Not that a juror should give his verdict contrary to his own sense of right. Every juror is bound in his verdict to say that it is such as he can conscientiously approve. But an honest attempt to come to an agreement, where from the nature of things you could not expect an agreement at first, is very different from a deviation from your oath, to decide the question by the law and the evidence given. It is highly improper, and the court would not hesitate to punish a juror who should undertake to render that verdict, not by his convictions of right, but by the decision of a game of chance or a game of skill.

You will say, gentlemen of the jury, whether this publication is one which imputed anything derogatory to Mr. Clark, and calculated to bring him into the hatred and ridicule of others. If you think it is not, if it is an innocent publication, if it is an imputation which you, gentlemen, would be willing to have made upon yourselves, you will decide accordingly. If, however, it does contain the imputation of an offence, then the question is whether this is justified before you. Was it true? An attempt was made to say that it was true, because the statement was not in positive terms. Even in this view of the case the defendant received no information that Mr. Clark himself played the game of drafts. But the law does not leave the reputation of individuals to hang upon so slender a ground as that. If you believe that the publication was made

with the intention to attack Mr. Clark, the defendant is not protected by using the words "it is said." What would have been the decision of the court, if the name of his informant had been given, I will not undertake to say. I only rule, as a matter of law, that putting in the words "it is said," does not protect the defendant. If it was not true, then, gentlemen, nothing remains to be done. He cannot justify the publication of a falsehood, even if his motives were good and his end justifiable. You will, then, inquire whether it is true, whether his motives were good, and whether his end was justifiable; and unless you find the three, gentlemen, the defendant is guilty.

The jury, after an absence of fifteen minutes, returned with a verdict of GUILTY.

The defendant afterwards filed a motion in arrest of judgment, on the following grounds; "(1) Because the publication set forth in the indictment on which the said Wright stands convicted, does not contain any libellous or indictable matter whatsoever; (2) Because the said publication set forth as aforesaid does not contain any such libel as is charged in the said indictment; (3) Because the said indictment does not profess to set forth the very words or terms of the alleged libel, but only the 'purport, effect and sub stance thereof;' (4) Because the said indictment is in other respects uncertain, informal and insufficient in law." The decision of the court has not yet been pronounced.

Richard Hildreth and *Horace E. Smith*, in support of the motion.
S. D. Parker, for the commonwealth.

Supreme Court of New Jersey, April Term, 1847.

PRICE *v.* BRAY. — WYKER *v.* BRAY.

Under the bankrupt law of 1811, the decree of discharge is a judicial decree and conclusive unless in case of fraud or concealment. The plaintiff therefore cannot reply to the plea of bankruptcy, that the defendant did not become a bankrupt; that he did not comply with all the requisites of the statute; or that he did not obtain a discharge.

A plea of bankruptcy must show the jurisdiction of the court by an averment of the filing of a petition to be declared a bankrupt, by a bankrupt, a resident of the district in which he obtained a discharge, or it will be insufficient on special demurrer; otherwise if the defect be waived by pleading over.

Semble, if the jurisdiction be shown, the plea will be sufficient if it set out the decree of discharge after a *taliter processum est*.

The plea of bankruptcy, as it consists of matter of fact as well as matter of record, should conclude with the ordinary verification. — *Pennsylvanian Law Journal.*

Digest of American Cases.

[Selections from 2 Denio's (N. Y.) Reports.]

ACTION.

Money voluntarily paid upon a claim of right, where there has been no mistake of any fact, cannot be recovered back. Payments directed by the board of supervisors, upon the adjustment of accounts against the county, fall within this principle. *Supervisors of Onondaga* v. *Briggs*, 26.

2. An action may be maintained on a promise made by the defendant to a third person for the benefit of the plaintiff without any consideration moving from the plaintiff. *Barker* v. *Bucklin*, 45.

3. Accordingly where B., being indebted to the plaintiff, sold property to the defendant who agreed to pay the price of it to the plaintiff, on account of his demand against B., *held*, that the plaintiff might maintain an action against the defendant on such promise. *Ib.*

4. Such agreement is not a promise to answer for the debt of a third person, and therefore is not required to be in writing. *Ib.*

5. An action for use and occupation will not lie where the defendant has neither *occupied* nor *held* the premises during the time for which the recovery is sought. *Beach* v. *Gray*, 84.

6. Accordingly where the plaintiff demised to the defendant for a term certain premises which the latter abandoned after occupying for a time, and the plaintiff gave the defendant notice that he should let them for the best terms he could get and hold him responsible for any deficiency, and then leased to another who occupied for the residue of the term, but became bankrupt and failed to pay; *held*, that *use and occupation* would not lie against the defendant for the time during which such other person occupied. *Ib.*

ACTION FOR MONEY HAD AND RECEIVED.

Assumpsit for money had and received is an equitable action, and generally raises the question to which party *ex æquo et bono* the money belongs. *Buel* v. *Boughton*, 91.

2. Accordingly, where the plaintiff gave a note for a demand bearing interest, but which through mistake was not made payable *with interest* to A., who transferred it to B., who transferred it to the defendant, and upon each transfer it was supposed by the parties to be on interest and was received and accounted for accordingly; and when it became payable the plaintiff also supposing it to be on interest paid the amount *with interest thereon; held*, in assumpsit for money had and received brought to recover it back, that the plaintiff could not recover. *Ib.*

3. Where a creditor claimed and received from his debtor upon the liquidation of a security bearing annual interest, an amount ascertained by a third person who made annual rests and computed interest upon interest, both parties supposing the amount paid to be correct; *held* that an action for money had and received would lie to recover back the excess paid beyond the amount due by a calculation upon correct principles. *Boyer* v. *Pack*, 107.

4. A party entitled to rescind a contract on account of failure of consideration or non-performance by the other party must, in order to enable him to bring a general action for money which he has paid on account of it, restore or

tender what he has received in part performance. *Colville* v. *Besly*, 139.

5. But where the thing delivered as part performance was not what was contracted for, but a different thing, he may bring such action without a redelivery or tender of what was so delivered. *Ib.*

6. Accordingly where the defendant had sold and agreed to deliver to the plaintiff a promissory note held by the defendant as indorsee, the makers of which had been discharged under the bankrupt act, but the indorser upon which was liable, and the defendant after the contract settled the note with the indorser and *cancelled the indorsement* and then sent the note to the plaintiff; *held* that the latter could maintain assumpsit for money had and received to recover what he had paid on account of the contract, without returning or offering to return the note. *Ib.*

7. The plaintiff gave the defendant a negotiable note, which the latter transferred to a *bona fide* holder; *held*, that the plaintiff, who had become entitled to rescind the contract on account of which the note was given, could recover from the defendant the amount of it in an action for money had and received. *Ib.*

8. The defendant and another person, in November, 1834, contracted with the canal commissioners to perform certain work on the Chenango canal, by October, 1836; and having commenced the work, they, in January, 1836, assigned their contract to the plaintiff, who agreed to finish the job at his own expense, for the prices stipulated for in the original contract; which upon his completion of the work were paid to him. In April, 1836, an act was passed providing for extra allowances to contractors on this canal, (Laws 1836, p. 201,) under which an award was made in favor of the original contractors, and one-half the sum awarded was paid to the defendant. *Held*, that the plaintiff was entitled to this money and could recover it in assumpsit against the defendant. *Munsell* v. *Lewis*, 224.

AGREEMENT.

In the body of a written contract it was stated to be made between R. & C., and by its terms C. was to deliver certain property to R., but it was signed by C. & H.; *held*, that both C. and H. were contracting parties with R. *Clark* v. *Rawson*, 135.

2. A note given by one who keeps a saw-mill and lumber-yard, for an amount "payable in lumber at cash price when called for," without mentioning day or place of payment, is payable on demand at the mill-yard. *Rice* v. *Churchill*, 145.

3. A special demand must be made there before suit brought. *Ib.*

4. But a personal demand of the maker elsewhere would be good unless met by an offer to pay at the yard. In such case the holder would be bound to go to the yard to receive payment. *Per* BEARDSLEY, J. *Ib.*

5. A demand at the mill yard is sufficient, though neither the maker nor any one authorized to make the payment be found there. *Ib.*

6. If upon such demand the maker be absent, it may be made of any one in charge; and if there be no such person it may be made publicly. *Ib.*

7. In an interview between the plaintiff, the defendant and one H., it was agreed by parol between the three, that H. should do certain work for the defendant for which the plaintiff should pay H. in goods, and that the defendant should pay the amount to the plaintiff in lumber. The work having been done, *held*, in a suit by the plaintiff on the defendant's promise, that it was made upon a good consideration and was binding. *Mathers* v. *Perry*, 162.

8. The agreement of a single individual to make a donation of money to a literary or religious institution, without any undertaking on the part of the donee to do anything, is without consideration and void. *Semble. Per* WALWORTH, *Chancellor. Stewart* v. *The Trustees of Hamilton College*, 403.

9. And an agreement by the institution to receive and invest the money when paid and apply the interest to the payment of the salaries of its officers, will not furnish a consideration to support the undertaking. *Semble. Per* WALWORTH, *Chancellor. Ib.*

10. But where several persons subscribe to raise money for an object in which all feel an interest, *e. g.* to support a religious or literary institution, the mutual promises of the several subscribers form a valid consideration for

the promise of each. *Per* WALWORTH, *Chancellor*. *Ib.*

11. The party for whose benefit such subscriptions are made may maintain assumpsit against the several subscribers, although such party is not connected with the consideration. *Per* WALWORTH, *Chancellor*. *Ib.*

12. A subscription to an instrument by which the subscribers undertake to pay the amounts set opposite to their respective names at a future time for the support of education, religion or charity, is a gratuitous promise and is void for want of consideration. *Per* BOCKEE, *Senator*. *Ib.*

13. But a promise to pay, provided the promisee would raise a certain amount by subscription, is a valid contract founded upon a good executory consideration. *Per* BOCKEE, *Senator*. *Ib.*

14. An undertaking to pay money upon the occurrence of an event which is not to be brought about by the promisee, is a naked promise upon which no action will lie. *Ib.*

15. Therefore a subscription paper, containing a provision to the effect that the subscribers were not to be holden unless the aggregate of their subscriptions amounted to a certain sum by a certain day, is without consideration. *Per* BOCKEE, *Senator*. *Ib.*

16. A subscription to raise a fund for the benefit of a college was conditioned to be void unless a certain amount should be subscribed by a given time; and shortly before the time had expired the board of trustees by resolution agreed to continue to raise subscriptions after the expiration of the time, to save harmless any persons who would engage to make good any deficiency in the amount of subscriptions which might be found to exist at the end of the time limited; and certain of the trustees, with other persons, thereupon signed an instrument undertaking to make up any such deficiency; *held*, that such agreement will not supply an actual deficiency in the other subscriptions, so as to make the subscription paper binding upon the several subscribers. *Per* WALWORTH, *Chancellor*. *Ib.*

ASSIGNMENT.

An assignment by a debtor pursuant to an insolvent act of all his estate, real and personal, passes the title to all the lands which he owns, without further description. *Roseboom* v. *Mosher*, 61.

2. Lands owned by him, though not mentioned in his inventory, pass by such assignment. *Ib.*

3. A reconveyance by the trustees will not be presumed, or their title be held to be extinguished, on account of the lapse of time without the assertion of a title under the assignment, where there is no proof that the debts of the insolvent have been paid. *Ib.*

ATTORNEY, SOLICITOR, AND COUNSEL.

A solicitor or counsellor of the court of chancery is not permitted to contract with his client for a part of the subject-matter of the litigation, as a compensation for his services. *Wallis* v. *Loubat*, 607.

2. Accordingly where a bill in chancery was filed for the specific performance of a contract to exchange real estate, and the rents of the defendant's property of which the complainant claimed a conveyance were paid to a receiver in the progress of the suit, who after a decree dismissing the bill, paid the same to the solicitor for the defendant, who was also the defendant's counsel, who claimed the same under an agreement with his client that he was to retain them for his services in the cause; on an application to compel him to pay them to the defendant, *held*, that such agreement was void. *Ib.*

3. Attorneys and solicitors are public officers and are subject to the control of the courts in which they practise; and are bound when they undertake the prosecution or defence of suits to serve their clients for the fees allowed by law. *Ib.*

4. A counsellor may, however, stipulate with his client for a reasonable reward for his services, irrespective of the allowance in the fee bill, though he is solicitor or attorney in the same cause. *Ib.*

BAILMENT.

Where one has personal property in his possession belonging to another which he is bound to deliver to the owner on demand at a particular place, such owner may make a personal demand at a different place; and if the possessor deny the owner's right, he

will be liable to an action. *Dunlap* v. *Hunting*, 643.

2. Accordingly held that an unqualified refusal to deliver the property would be a breach of the obligation. *Ib.*

3. So if the answer that he has not got the property, without intimating that anything had happened to discharge him from his obligation, it is a denial of the bailment, and he is liable. *Semble*. *Ib.*

4. It is at least evidence upon which the jury might find such denial. *Ib.*

5. But if he answer that he is ready to deliver at the proper place, that will be no breach of duty. *Ib.*

6. Accordingly where the plaintiff as a constable had a warrant to collect a military fine, and levied on two books belonging to the defendant, and left them in his possession on his agreeing to deliver them to the plaintiff at a future time, and the plaintiff met the defendant in a different town and there demanded them, and the defendant answered either that he had not got the books or that he would not give them up; *held*, that the evidence was sufficient to enable the jury to find a conversion of the books. *Ib.*

BANKRUPT AND BANKRUPT LAW.

A cause of action in trespass is not affected by a discharge in bankruptcy, even though a verdict had been rendered before the presentment of the petition to be declared a bankrupt. *Kellogg* v. *Schuyler*, 73.

2. A judgment rendered after the defendant had presented his petition to be declared a bankrupt is not affected by the bankrupt discharge subsequently obtained in that proceeding. *Ib.*

3. The lien upon a debtor's property and rights in action created by an execution returned unsatisfied and the commencement of a suit by judgment creditor's bill, is not divested by a subsequent discharge in bankruptcy. *Macy* v. *Jordan*, 570.

4. *Semble*, that the judgment remains on foot, notwithstanding the discharge, so far as it may be necessary to uphold proceedings to enforce the lien. *Per* JEWETT, J. *Ib.*

BILLS OF EXCHANGE AND PROMISSORY NOTES.

The second indorsee and holder of a bill had obtained judgment against the drawers, and the second indorser who was liable on the paper, paid the amount to the holder and received from him an assignment of the judgment; *held*, that this was not an extinguishment of the debt against the drawers or the prior indorser. *Harger* v. *McCullough*, 119.

2. The drawers were an incorporated company, the stockholders of which were personally liable for its debts. *Held*, that the assignee might use the name of the plaintiff in the judgment in an action to enforce the liability of a stockholder. *Ib.*

3. Where a bill of exchange was drawn by several, one of whom joined in it as a surety for the others, who procured the bill to be discounted before acceptance for their own benefit; and the drawee with knowledge of these facts accepted and paid the bill without funds of any of the drawers in his hands, *held*, that he might recover the amount against all the drawers in an action for money paid to their use. *Suydam* v. *Westfall*, 205.

4. Where cross notes are made and specifically exchanged by the makers, each note is the proper debt of the maker thereof, and each holder is a purchaser for value. *Per* BEARDSLEY, J. *Dowe* v. *Schutt*, 621.

CASES OVERRULED, DOUBTED OR EXPLAINED.

Supervisors of Sullivan *v.* Dimmick, (18 Wend. 538,) overruled. *Supervisors of Onondaga* v. *Briggs*, 26.

2. Simpson *v.* Patten, (4 John. 422,) and Jackson *v.* Rayner, (12 Ib. 291,) commented on and explained. *Barker* v. *Bucklin*, 45.

3. De Bow *v.* the People, (1 Denio, 9.) overruled. *Gifford* v. *Livingston*, 380.

CIRCUIT COURT OF THE UNITED STATES.

The amount of damages laid in a declaration in assumpsit is *prima facie* to be considered the amount in dispute in determining whether a cause is removable into the circuit court of the United States, under the act of congress. *The People* v. *The Judges of the N. Y. Common Pleas*, 197.

2. But it seems this is not conclusive, and that the plaintiff, to prevent the removal, may show by affidavit that his

claim amounts to less than five hundred dollars. *Per* BRONSON, C. J. *Ib.*

3. The plaintiff may amend his declaration in the state court after the defendant has presented his petition, by reducing the damages claimed below five hundred dollars, after which the cause cannot be removed. *Ib.*

4. This court will not grant a *mandamus* to compel a court of common pleas to permit a cause pending there to be removed to the circuit court of the United States; the latter court having itself the power to award the writ when necessary to the exercise of its jurisdiction. *Ib.*

CONSTITUTIONAL LAW.

Where the constitution provides for the appointment to an office in a particular manner, the legislature has no power to create a new office for the performance of the same, or the principal part of the same duties, and to direct the appointment to be made in another manner. *Warner* v. *The People*, 272.

2. But the legislature may regulate and add to or diminish the duties or the fees of a constitutional office. *Per* WALWORTH, *Chancellor*. *Ib.*

3. The act authorizing the appointment of a clerk of the court of common pleas of the city and county of New York by the first and associate judges of that court, (Stat. 1843, p. 63,) is unconstitutional and void; for the reason that the duties of that office appertain to the office of clerk of the city, and county of New York, whose appointment in another mode is provided for by the constitution. *Ib.*

4. If the appointment was one which the constitution had directed to be made by the court of common pleas, the act would be void for directing it to be made by the first and associate judges only, to the exclusion of the mayor, recorder and aldermen, who are also members of that court. *Ib.*

5. The act entitled "An act to authorize the business of banking," passed 18th April, 1838, was constitutionally passed, although it did not receive the assent of two-thirds of the members elected to each branch of the legislature, and is a valid act. *Gifford* v. *Livingston*, 380.

6. The authority conferred by the statute (2 R. L. 368, § 81,) on the mayor, &c. of the city of New York, to order the destruction of buildings to prevent the spreading of a fire, is not a grant of the right of eminent domain, and is not therefore within the constitutional provision requiring compensation to the owner of private property taken for public use. *Per* SHERMAN and PORTER, *Senators*. *Russell* v. *The Mayor, &c. of New York*, 461.

7. The statute conferring that authority is a regulation of the right which individuals possess to destroy private property in cases of inevitable necessity, to prevent the spreading of fire or other great calamity. *Per* SHERMAN, *Senator*. *Ib.*

CORPORATION.

The common council of the city of Buffalo have no authority to furnish an entertainment for the citizens and guests of the city at the public expense. *Hodges* v. *The City of Buffalo*, 110.

2. Accordingly, it was held that an action would not lie against the corporation at the suit of one who had provided such entertainment, on independence day, upon the employment of a committee authorized by the common council to contract for it. *Ib.*

3. An action on the case for *malfeasance* will lie against a corporation. *The Mayor, &c. of New York* v. *Bailey*, 433.

4. A municipal corporation is responsible for the negligence or unskilfulness of its agents and servants when employed in the construction of a work for the benefit of the city or town subject to the government of such corporation. *Ib.*

5. Stock in an incorporated company cannot be transferred so as to pass a legal title after the dissolution of the corporation. *James* v. *Woodruff*, 574.

6. After such dissolution, the interests of the several stockholders become equitable rights to a proportionate share of the assets after payment of the debts. *Ib.*

7. A stockholder who is indebted to the corporation at the time of its dissolution, is only entitled to his share of the effects after deducting the amount which he may owe. *Ib.*

8. An assignee of a stockholder in a dissolved corporation takes the interest of the assignor, subject to all claims

which the corporation has against him. *Ib.*

9. Where stock in a corporation which has been dissolved is purchased by a debtor of the corporation, such purchaser is in the same situation as though he had been a stockholder when the corporation was dissolved, and must therefore submit to have the debt which he owes deducted from his share of the assets; and one who purchases the stock from him takes it subject to the like deduction. *Ib.*

DAMAGES.

Where one contracts to employ another for a certain time at a specified compensation, and discharges him without cause before the expiration of the time, he is in general bound to pay the full amount of wages for the whole time. *Costigan* v. *The Mohawk and Hudson Railroad Company*, 609.

2. So *held*, where the party was employed as superintendent of a railroad for one year at a salary of $1500, and remained without employment during the whole period subsequent to his discharge, having given notice to the company that he was ready to continue in its business. *Ib.*

3. But in a suit for the stipulated compensation, the defendant may show in diminution of damages that after the plaintiff had been dismissed, he had engaged in other business. *Per* BEARDSLEY, J. *Ib.*

4. So it may be shown in reduction of damages that employment of the same general nature as that from which he had been dismissed, and to be carried on in the same locality, had been offered to the plaintiff and refused by him; but not a different kind of employment, or business to be conducted at another place. *Per* BEARDSLEY, J. *Ib.*

5. But the opportunity to be so employed will not be presumed, but must be affirmatively shown by the defendant. *Ib.*

6. In case for unfastening a vessel from a dock, by means of which it floated off and was injured, the damages will not be mitigated by proof that the owner of the vessel, after it had been so unfastened and set adrift, had neglected to take such measures as were in his power to recover and secure it. *Heaney* v. *Heeney*, 625.

DOWER.

Where a testator devised all his real and personal estate to his wife during her life or so long as she should remain his widow, and after her decease or re-marriage, to his children; and the widow, having survived him, entered and occupied under the will for several years and then married a second husband; *held*, that she was entitled to dower. *Church* v. *Bull*, 430.

FRAUDS, STATUTE OF.

Where B. being indebted to the plaintiff sold property to the defendant, who agreed to pay the price of it to the plaintiff on account of his demand against B.; *held*, that such agreement was not a promise to answer for the debt of a third person, and therefore was not required to be in writing. *Barker* v. *Bucklin*, 45.

2. There is a distinction between a promise to pay one's own debt to a third person instead of his own creditor, the latter agreeing that the payment shall be so made in order to discharge his debt to such third person — and an agreement to pay the debt of another person to the creditor of such person upon some other consideration. The first is not within the statute of frauds; the latter is, and is void even if made upon a new and distinct consideration, unless it be also in writing and express such consideration. *Per* JEWETT, J. *Ib.*

3. The cases of *Simpson* v. *Patten*, (4 John. 422,) and *Jackson* v. *Rayner*, (12 *Ib.* 291,) commented on and explained. *Per* JEWETT, J. *Ib.*

4. A parol agreement which is not wholly to be performed within one year is void, though some of the stipulations are to be executed within the year. *Broadwell* v. *Getman*, 87.

5. And it is void although one of the parties is to perform everything on his part within the year, if a longer time than a year is stipulated for the performance by the other. *Semble.* *Per* BEARDSLEY, J. *Ib.*

6. The defendant in January agreed by parol to clear a piece of wood land for the plaintiff and partly to fence one end of it, which the plaintiff was to complete, the whole to be done in one year from the ensuing spring, when the defendant was to put in a crop which, with the wood and timber, ex-

cept that used for the fences, he was to have for his compensation. In an action against the defendant for non-performance, *held*, that the contract was within the statute and was void. *Ib.*

7. In an interview between the plaintiff, the defendant and one H. it was agreed by parol between the three, that H. should do certain work for the defendant, for which the plaintiff should pay H. in goods, and that the defendant should pay the amount to the plaintiff in lumber. The work having been done, *held*, in a suit by the plaintiff on the defendant's promise that it was not within the statute of frauds. *Mather* v. *Perry*, 162.

8. The contract of a factor to account for the amount of sales made by him under a *del credere* commission, is not within the provision of the statute of frauds relating to promises to answer for the debts, &c. of third persons, and need not therefore be in writing. *Wolff* v. *Koppel*, 368.

INSURANCE.

The rule which prevails upon sales of property, that a warranty does not extend to defects which are known to the purchaser, does not apply to warranties contained in contracts of insurance. *Jennings* v. *The Chenango Co. Mutual Insurance Company*, 75.

2. Conditions of insurance annexed to a fire policy and the written application of the assured, when referred to in the policy as forming part of it, are parcel of the contract, and have the same effect as though written in the body of it. *Ib.*

3. Statements in the application, where that is made part of the policy, of the purpose for which the property insured is to be occupied, and of its situation as to other buildings and warranties, and if untrue, the policy is void though the variance be not material to the risk. *Ib.*

4. And parol evidence that the insured truly informed the agent of the insurer who prepared the application as to these particulars is not admissible. *Ib.*

5. Where the conditions which were made a part of the policy declared that all applications for insurance must be in writing, and must state the relative situation of the property as to other buildings, and the distance from each if less than ten rods, and the printed application was so filled up as not to show the distance of other buildings from the insured property, though there was one within ten rods; *held*, that the insured could not recover. *Ib.*

6. So where the conditions required the application to state for what purpose the insured property was occupied, and in the application it was only called a grist mill, and it was proved that carpenter's work was accustomed to be done in it, with instruments and fixtures which were kept there; *held*, that the policy was void. *Ib.*

LIBEL.

The defendant, who was the editor of a newspaper, owed the plaintiff money upon an award of arbitrators; in speaking of which and of the plaintiff in an article in his paper he said, the money will be forthcoming on the last day allowed by the award, but we are not disposed to allow him to put it into Wall street for shaving purposes before that period; *held*, not libellous. *Stone* v. *Cooper*, 293.

2. A declaration for libel stated by way of inducement that there were vague reports in circulation that the plaintiff had done something disreputable and disgraceful to his character in connection with breaking or causing to be broken a lock or locks for the purpose of taking on execution money in the possession of one A. M. B., and then set forth a publication by the defendant in relation to money which he owed the plaintiff, in which it was said "there will be no locksmith necessary to get at the ready," which the declaration averred referred to the reports and was intended to charge the plaintiff with having done something disgraceful; *held*, insufficient, and that the substance of the reports should have been stated. *Ib.*

LIEN.

The mechanic has a lien upon articles repaired by him for his labor and materials, and may retain possession until he is paid. *Per* BEARDSLEY, J. *Gregory* v. *Stryker*, 628.

MALICIOUS PROSECUTION.

An action for malicious prosecution cannot be maintained without showing the absence of probable cause, in ad-

dition to proof of express malice. *Foshay* v. *Ferguson*, 617.

2. Probable cause is a reasonable suspicion supported by circumstances, sufficient to warrant a cautious man in the belief that the person accused is guilty of the offence charged; and such cause will afford a defence to the action for malicious prosecution, however innocent the plaintiff may be. *Ib.*

3. But the facts inducing the suspicion must be known to the defendant, or he must have had information of them at the time of commencing the prosecution, or they will not avail him. *Per* BRONSON, C. J. *Ib.*

4. Where, in an action for maliciously indicting the plaintiff for stealing cattle, it appeared that the plaintiff who was driving cattle to market, had, on passing the defendant's farm received into his drove two of the defendant's cattle, and had proceeded on his journey with them seventy miles, when he was overtaken by the defendant, who charged him with the theft, and the plaintiff paid him a large sum to settle the affair; and the defendant was likewise informed that the plaintiff had, on his route driven off cattle belonging to another person; *held*, that the action would not lie, though it was shown that the plaintiff had instituted the prosecution from malicious motives, and the defendant had been acquitted. *Ib.*

PRINCIPAL AND AGENT.

Where an agent neglects to perform a duty which he owes to his principal, and third persons are thereby injured, their remedy is against the principal and not against the agent. *Denny* v. *The Manhattan Company*, 115.

Accordingly, where the plaintiffs were the assignees of a certificate of stock standing in the name of another person in a foreign banking corporation which had a transfer office in this state under the charge of an agent authorized to register transfers, who unjustly refused to permit the plaintiffs' stock which was registered in that office to be transferred to them on its books, upon which they brought case against the agent; *held*, that the action could not be maintained. *Ib.*

TRUST AND TRUSTEE.

Where property is conveyed to a religious corporation, (or to a religious society which afterwards becomes incorporated,) to promote the teaching of particular religious doctrines, and the funds are attempted to be diverted to the support of different doctrines, it is the duty of the court of chancery, under its general jurisdiction over trusts, to interpose for the purpose of carrying the trust into execution according to the intention of the donors. *Semble.* *Miller* v. *Gable*, 492.

2. It is not a defence to a suit brought to enforce such a trust, that the deviation from the faith and doctrine to which the property was devoted by the donors, is sanctioned by a majority of the church or congregation, who, through trustees chosen by such majority, are administering the trust according to their views. *Semble.* *Ib.*

3. In the case of a clear violation of a well defined trust of this character, the court would be bound to interfere upon the complaint of a minority against the majority of the congregation. *Semble.*

4. In ascertaining the purposes to which property conveyed to a church was intended to be devoted, the language of the conveyance, if clear and unequivocal, is conclusive. If the language is indefinite, extrinsic evidence, such as the tenets held by the donor, or the faith then actually taught by the donees, and the circumstances under which the gift was made, is admissible in ascertaining the intention. *Per* GARDNER, *President.* *Ib.*

5. A religious society, subordinate to church judicatories, declares itself independent, and becomes incorporated under the general act, and then purchases land, which is conveyed to the corporation; such corporation is entitled to administer the estate so purchased independently of such church judicatories. *Per* BEERS, *Senator.* *Ib.*

6. Where a church organized on the basis of independency, afterwards unites with the organization of another church, by becoming subordinate to its judicatories, such union, so far as the temporalities are concerned, is binding only so long as the parties to it mutually consent to its continuance. *Per* GARDINER, *Pres.* *Ib.*

Notices of New Books.

THE MASSACHUSETTS JUSTICE. A TREATISE UPON THE POWERS AND DUTIES OF JUSTICES OF THE PEACE, WITH COPIOUS FORMS. By JOHN C. B. DAVIS. Worcester: Warren Lazell. 1847.

There are, probably, three thousand justices of the peace in Massachusetts. Nor is there any probability of the number ever becoming less, especially if, now and then, there should be a change in the political character of the administration. The appointment to this office seems to be a kind of small change with which the services of leaders among the rank and file of a party are to be paid. And whenever the turn of the wheel brings a new dynasty into power, the commonwealth is sure to be blessed with a new batch of keepers of the peace and justices of the quorum.

To instruct all these and keep pace with the constant "improvements" which our legislature is making in the law, and furnish a clue by which a tolerably shrewd man can steer between Scylla and Charybdis, in navigating a complaint for assault and battery, or a five dollar debt, through the sea of litigation, must be a work of no little industry and skill. And when, on the other hand, it is remembered how liable a man is to fall into temptation, or, what is worse, into debt, whereby he may find himself the victim of a justice's jurisdiction, it must be a desideratum for the uninitiated, of no small consequence, to know how to escape the meshes of the law, when called upon, in the name of the commonwealth, under the dread seal and sign-manual of John Doe, Esquire, to answer for breaching the peace, or breaking a promise.

Nor is such a work a new thing under the sun. As there were heroes before Agamemnon's day, so there have been makers of "Massachusetts Justices," and that, too, without the hand of governor or council, before the author of the present work had taken his stand among the gentlemen of the (*lucus a non lucendo*) long robe. Old men can easily remember when Freeman was the standard for country justices. And well he might be, if the title of his work, as we now copy it from an advertisement, published in 1797, furnished a true character of the work. "The Justice's Assistant, or Massachusetts Justice: being a collection of the laws of the Commonwealth of Massachusetts relative to the power and duty of Justices of the Peace, both in their individual capacity and as composing the Courts of General Sessions. To which are added, under the proper heads, a variety of Forms grounded on said laws. *Being a very necessary and useful book for those who practise in the office of a Justice, to assist them in the various duties thereto belonging.*" A book that could do all that, would be, indeed, a book worth preserving for a perpetual text-book; but in the process of time, however, Mr. Dickenson sent forth his work, somewhere about thirty years ago, and at a far more recent period, Mr. Hammond has added another to the sum of legal science, appertaining to justice's courts.

In the meantime, the work of the late Mr. Solicitor Davis had been published, and took at once the high rank which it long sustained among the safe and useful law books for the many. Its author was one of the best prosecuting officers that ever practised in Massachusetts, and neatness and accuracy characterized all his literary and professional efforts.

The changes that took place in the forms of legal proceedings, and in the terms and phraseology of many of the statutes, by the substitution of the Re-

vised Code for those previously in use, and the great variety of decisions to which the interpretation of the Revised Statutes gave rise, seemed to justify, if it did not imperatively call for, a new work upon the civil and criminal duties and powers of magistrates.

So far as we have been able to judge from a somewhat hasty examination of the book before us, we are ready to believe that it is calculated to meet the wants of the public in this respect. It is divided into two parts, embracing the civil and criminal duties of a magistrate, together with an appendix of "practical remarks upon conveyancing, with appropriate forms." This "appendix," we suppose, was added to render the work perfect and complete; for, if the twenty-two pages it contains do not make the justice who reads it a safe and learned conveyancer, we doubt if a work of double its size would make him so.

While the profession is as much crowded as it now is, it would be a pity to check cheap conveyancing. We have heard gentlemen of the medical faculty extol the advantages of disseminating a work like Buchan's Domestic Medicine and its recipes, whereby every man and woman may become not only his or her own physician, but that of a neighborhood. Nor should the legal profession be less in favor of cheaply-written deeds and contracts, since it is every day's experience that men are willing to pay three times as much to a competent lawyer, to tell them what these mean, as they are to have them originally well written. Long may such economy give an opportunity to justices of the peace and members of the profession to share in the profitable trades and cunning bargains of penny-wise clients!

To look for a full treatise upon criminal law, with anything like a complete system of precedents for framing complaints in all matters cognizable by our justices of the peace, in a space of some three hundred pages, is an absurdity of which few men, of any tolerable share of experience, would be guilty. And we would venture to suggest to intelligent magistrates, not read in the law, that no "Massachusetts justice" should be regarded as embodying all that it would be useful to know. But if they will examine Mr. Davis's work, and follow out his hints and his forms, as well as the legal principles and enactments which it embodies, they will be able to steer clear of many of the difficulties which well-intentioned magistrates often encounter in their course; and it would do much towards elevating that most useful and honorable class of our citizens, in the scale of judicial and administrative respectability.

In one particular, at least, we hope to see an improvement, and that is, in the matter of "liquor cases." Instead of seeing complaints in these cases quashed by scores, for defects and informalities, as has been the case heretofore, we think there is enough, in the present work, to render a magistrate inexcusable in causing such a needless expense. The law, it is true, has been settled upon this subject only after a sifting ordeal of legal and quibbling ingenuity, which we do not believe was ever exhibited upon any other subject. It would have seemed impossible to conjure up a quarter so many questions as have been raised and sharply contested upon the first three sections of the forty-seventh chapter of the Revised Statutes. Lawyers have spun the finest webs, and courts have brought into play the nicest canons of ratiocination upon the mode of selling a glass of gin "toddy," that our books contain. The metaphysics of the schools can scarcely furnish specimens of more subtle refinement. But we trust the day of this prolific source of litigation is passing away, and believe that the work under consideration will aid in accomplishing so desirable an end.

The present might be a fitting occasion for saying a single word of the limited jurisdiction of magistrates in Massachusetts. Under the colony and province charter, this jurisdiction was limited, in civil matters, to forty shillings; but with the law as it now is, it extends to the amount of twenty dollars, with some few exceptions. It has been thought by many, that by extending this still more, the court of common pleas might be partially relieved from the press of business, which, in several counties, so much clogs its dockets. But from the want of success which has hitherto attended every effort to effect such a change, it is pretty obvious that the public view, with great jealousy, any attempt to substitute the judgment of any one man for a trial by jury. Perhaps, too, it is thought that the members of a court which receives such

princely salaries as are paid to the court of common pleas, in this state, have no occasion for relief, be their burden what it may.

We hope never to see the attachment to trial by jury, any less than it now is. It is the good old way of settling disputes, and we do not believe a better one will ever be invented. Half the cases, we doubt not, which are tried, might be as correctly and far more cheaply determined, by the judgment of one man. But, after all, as one great object of administering justice is to satisfy those who pay for it, while there is a drop of Saxon blood that runs in a suitor's veins, he had a thousand times rather lose his cause by the verdict of twelve men, after having carried the matter to the "bat's end," even at the cost of an hundred dollars, than sit down under any single man's judgment, though it might be the same with the verdict, and at a tithe of the cost.

If any one is curious to see how prolific our commonwealth is in legislation, we commend to his attention "Appendix B," in Mr. Davis's book, which is "a table shewing the various sections of the Revised Statutes which have been altered or repealed by subsequent statutes, or which have received judicial construction." The table fills nine pages of double columns. If this so much elaborated and lauded body of Revised Statutes has, in less than eleven years, given rise to between one and two thousand citations in modifying or explaining them, perhaps some one will be able to form a calculation when the law of the land will become "settled." We fear there will ever be the same truth there now is in one of the author's remarks in the book of which we are speaking; — "the most careful magistrate will sometimes find himself in doubt, and will hesitate as to the exercise of his power."

So far as this work shall aid in clearing up these doubts, the public will owe the author an obligation which they will doubtless be ready to repay to the publisher, by purchasing his volume.

REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF ERRORS OF THE STATE OF CONNECTICUT. By THOMAS DAY. Vol. 17.

The contents of this volume afford cumulative evidence of the healthful administration of the law in that ancient commonwealth. The well-reasoned opinion of Williams, then chief justice, in the case of the *Enfield Toll Bridge Company* v. *The Hartford and New Haven Railroad Company*, indicates anything but a mind in dotage. Indeed, were it not preëstablished as *res adjudicata*, by the constitution of Connecticut, that no mind can be competent for judicial functions after the age of threescore years and ten, the clear, broad, and comprehensive views and forcible argumentation of that judge in this case and many others reported in this volume, would lead us to discredit the fact of his incapacity. The reason given by Connecticut men, in favor of this law, which disqualifies all judicial officers at the age of seventy, is that for one good judge it removes, it rids them of several grannies. We certainly think they have lost the good judge, in the loss of Mr. Chief Justice Williams, under the operation of that law.

The decision in *Roberts* v. *Church*, p. 142, strikes us as an absurdity, and we infer the learned reporter received the same impression, for he has omitted the name of it in his table of cases, and if any allusion is made to it in the general index it has escaped our notice. The statute requires a demand to be made of the debtor on an execution, before a levy on real estate. In this case a demand was made, and then the execution was suffered to expire, and then an *alias* issued, on which a levy was made and completed, without any further demand on the debtor. The ordinary mode of issuing an alias (or *renewing* the execution, as it is called) there, is for the clerk simply to change the date of the old execution, — thus avoiding the necessity of writing out a new writ on a new piece of paper. The question in the case was, whether such demand on the old execution was sufficient to justify, and give a good title under a levy on the *renewed* execution, — or, as the court state, "did the officer make a demand of the debtor under authority of the same process which he afterwards levied upon the land in controversy?" And they held that he did — and that as "this *was the identical paper* with the *identical signature* which was first issued," it was substantially the same execution, although the date had been changed. As if there was some virtue in the material paper

itself, which, by a new theory of metempsychosis, could bridge the interval between the old writ and the new — or as if the changing of the date by the clerk was not the same thing precisely, in effect, as issuing a new writ of execution on a different piece of paper. *Ranney* v. *Edwards*, p. 309, and also *Pinney* v. *Barnes*, p. 420, seem open to observation, did not our limits of space and time forbid.

The amount of questionable doctrine, however, in this volume, is very small, and on the whole the judgments recorded in it sustain the well-earned reputation of the court for conservative ability. The duty of Mr. Day, the veteran reporter, has been, it is needless to say, performed with judgment and discrimination. B.

DIGEST OF THE MARYLAND REPORTS: COMPRISING HARRIS & MCHENRY, FOUR VOLUMES; HARRIS & JOHNSON, SEVEN VOLUMES; HARRIS & GILL, TWO VOLUMES; GILL & JOHNSON, TWELVE VOLUMES; BLAND'S CHANCERY REPORTS, THREE VOLUMES. By WILLIAM HENRY NORRIS, GEORGE WILLIAM BROWN, and FREDERICK WILLIAM BRUNE, JR., OF THE BALTIMORE BAR. Baltimore: Cushing & Brother. 1847.

We are glad to see that the valuable reports of the state of Maryland have been digested and placed more conveniently within the reach of the profession. The work has been executed by Messrs. W. H. Norris, G. W. Brown, and F. W. Brune, Jr., of the Baltimore bar, among whom many readers will recognize the names of valued friends and lawyers of rising reputation. In their preface, these gentlemen state distinctly the manner in which the compiling has been done, and inform us what part was especially confided to each. We are glad to see that no part of the work was farmed out. The printers have done their duty in a very creditable manner. Of the merit of the digest we can only say, not having thoroughly examined it, that the execution has been conducted upon the best principles, all the work done by the parties themselves, and the best models followed.

We believe we may say that the hope expressed by the compilers in their preface is realized, and that they have a right to feel that they have "rendered important aid to the administration of justice in the state, as well as an acceptable service to the profession of which they are members."

A TREATISE ON THE RIGHT OF PROPERTY IN TIDE WATERS AND IN THE SOIL AND SHORES THEREOF. By JOSEPH K. ANGELL. Second edition: Revised, corrected and much enlarged. Boston: Little & Brown. 1847.

The first edition of this work was published in 1826, and was the only work professedly designed as a full and systematic exposition of the law in this country, in relation to public and private rights in tide waters, and the interests of riparian proprietors connectively with public rights. Since that time the extent and importance of this subject have become more manifest, and many questions of grave importance have been definitely determined. It was the remark of a distinguished judge, that no book was ever fairly written till it had passed through the ordeal of a thorough revision by the author, for a second edition. This has been done by Mr. Angell, and we trust he will find his account in it by the increased demand for his valuable treatise.

THE EVIDENCE OF THE VALIDITY OF THE WILL OF OLIVER SMITH, AND THE ARGUMENTS OF MESSRS. CHOATE AND WEBSTER, IN THE SUPREME JUDICIAL COURT AT NORTHAMPTON. WITH A BIOGRAPHICAL SKETCH, AND A COPY OF THE WILL AND PROBATE PROCEEDINGS. By JAMES W. BOYDEN, Attorney at Law. Amherst: H. B. Nims. 1847.

This was an interesting case upon an issue to try the validity of a will, the objection being "that the will and codicil thereto were not attested and subscribed in the presence of the testator, by three competent witnesses; — competent at the time of attestation." The precise point in issue was the insanity of one of the witnesses. The case was reported at some length in the newspapers, but we are glad to see a report of it preserved in the present form. We shall probably allude to the case hereafter, at greater length.

Intelligence and Miscellany.

Trial for Arson — Plea of Insanity. The Plymouth (Mass.) Memorial gives the following report of the trial of Lewis Cobb, which recently took place in that town, in the court of common pleas: The prisoner, a resident in Middleboro', was charged with arson. He had given a deed of the house burned to John Carver, and received a bond of defeasance. The condition had been broken, the mortgagee had commenced a suit, and the action was pending at this term of the court. Under these circumstances, Cobb was indicted for setting fire to "the house of John Carver." The defence set up was the insanity of the prisoner. The facts of the case, as stated by the witnesses, were not denied by the prisoner's counsel. It was proved, that Cobb's house was burned on the morning of the 13th of July; that he came up, and remarked that it was burning down smoothly; that on being asked how it was done, he answered "I s'pose I did it;" that he gave as a reason for so doing, his desire to make peace, as "the house had always made difficulty, and this was the best way to settle it." He said, that he knew the consequences and wished no one to suffer. He afterwards told the sheriff, that he had acknowledged the crime, and that he chose to criminate himself, that he hoped he should go where he could be comfortable now, and that he supposed it was a state prison offence. He had been very unhappy at Fall Brook. The anti-temperance influence there had injured him. It appeared that the house had been built in 1840, at great expense; that Cobb had been obliged to mortgage it, and that he was greatly disturbed by Carver's attempts to gain possession. He had said on one occasion, that the Carvers should never have the house, and the witness understood him to mean that they should never have it, whether he could pay or not. He, however, promised to pay, and worked very hard to raise money to discharge his debt. Mr. Harlow, one of the chief witnesses for the government, testified to the impulsive, irritable and restless disposition of the prisoner. He had been wrecked seven or eight years ago, and exposed to great peril and suffering. Since that time he has been more uneasy and "nervous." Yet he appeared capable of transacting business, though, as to money, careless.

The counsel for the prisoner opened his case with few words. He thought that the circumstances showed a want of sanity. The prisoner burns his own house, comes into a crowd of spectators, remarks that it is burning finely, and says, "'Twas I that did it." His personal property was all exposed, and much of it lost by the fire, and he could hope to gain nothing by it. It was proved that he was subject to strange fits of passion, restless and excitable. His nerves were all unstrung. His character as a hard working man was not inconsistent with his insanity. Many men, who were not accountable beings, showed "method in their madness," and appeared sane at times. The prisoner had been in great peril and extreme suffering at sea, and since that time his nervous system had been more than ever deranged. No defence had been prepared; but he would call some of Mr. Cobb's neighbors, who happened to be present.

The witnesses testified to the restlessness of Cobb's disposition, to his carelessness in regard to money matters, and gave some facts, showing the unsettled state of his mind. Z. Eddy, Esq. had known the prisoner for ten years. He had the fever and ague after his wreck, and at the same time he became embarrassed by the expense of building his house. Lately, he seemed anxious and excited, and *as to the house*, Mr. Eddy thought "his mind was started." His conversation was incoherent; he had spent all his property upon the house; worked in the swamps, summer and winter, to redeem it, and could not bear to give it up. Three years ago he had attempted to take possession of his mother's thirds in his father's estate. Mr. E. had seen him once in jail. He was agitated, weeping, running about, saying that he did not remember his confession, and it all seemed like a dream.

Mr. Coffin made no plea in defence, nor did Mr. Clifford address the jury on the part of the government. The judge's charge was short, clear, and simple. The rule laid down by the supreme court, in *Commonwealth* v. *Rogers*, was, that if the party had sufficient capacity to distinguish between right and wrong, and understood the nature and consequences of his act, and had mental power enough to apply his knowledge to his own act, he was not entitled to an acquittal. This was the law, and by this the jury were bound. The jury, after a consulation of fifteen minutes, returned a verdict of *guilty*. The punishment is imprisonment for life in the state prison. But the case is to be carried up to the supreme court — on the legal question — whether a house mortgaged under such circumstances as Cobb's, was rightly stated to be the property of the mortgagee, or whether the mortgagor can be charged with arson for burning the mortgagee's house.

Quasi Corporations.

To the Editor of the Law Reporter.

I wish for a few moments to call the attention of your readers to the subject of *Quasi Corporations* — there seeming something in the law as I understand it, relating to the liabilities of the individual members of such corporations, so unjust, that I am constrained to doubt its correctness. In 1 Greenl. Ev. p. 380, it is said that corporations are of two kinds, public and private. The former are such as counties, towns, boroughs, parishes, and the like. "These corporations sue and are sued," &c. "*Each inhabitant is directly liable in his person to arrest, and in his goods to seizure and sale, on the execution, which may issue against the collective body, by that name.*" I believe this to be the doctrine as generally advanced; and yet I apprehend its consequences would be such, that it could never be practically applied; at least in this country. Let me examine for a moment its operation. Suppose a certain county had contracted a debt, that afterwards A. moved into the county, that a suit should then be brought against the county, judgment obtained and execution issued, and levied on the property of A., who was not in the county, or perhaps the state, at the contraction of the debt, and who never received any advantages for which the debt was originally contracted, — Could such a proceeding be sustained? But we might go farther and suppose judgment obtained, and execution issued, before A. became a resident of the county; what would prevent the debt being collected of one who, at the rendition of the judgment was in England? In such case, if the debt of the county be collected of one individual, what course must be taken to obtain redress? He must wait until the revenues of the county will remunerate him, or he must sue the other inhabitants of the county for each one's share of the debt; and they being members of the same corporation, I suppose he could not sue at law, but would be driven into a court of Equity; and would he not have to bring as many different suits as there are men in the county? Thus, if there were 1000 men in the county, and he has paid $ 1000, must he not bring a suit against each man to recover his share of $ 1? I cannot see how these consequences can be avoided, if the doctrine under consideration be correct. Is there any law compelling the member who has paid the debt, to wait until the funds of the county are sufficient to satisfy his demand? If so, his redress in many instances would be wholly inadequate; for, in some counties the orders of the county would not be worth fifty

per cent., and he might wait a lifetime before he could be remunerated. Again, at the time A. paid the debt there might have been 1000 men in the county; but when he brings his suit, by disease, removal, or otherwise, there may be only 900 remaining; how much must each man then pay? Must he pay his original share, or the share increased by reason of the diminution of the payers; or shall each one contribute according to his property? There are other consequences growing out of this construction of the law, equally as injurious as those I have named. If a county is indebted, persons will not move into it, for fear of their property being taken to satisfy the debts of the county. If I hold a claim against a county (or any other public corporation) for $100, why will I sell it for fifty or seventy-five per cent., when by suing the county, I could easily make the money out of individual property? I think the objections I have already named are so obvious, that either I have not read correctly, or the doctrine, as stated in the books, cannot be law. I have made these remarks for the purpose of obtaining the correct doctrine on this subject; and hope, that through your periodical the law may be clearly expounded.

Fairfield, Illinois. B.

Hotch-Pot.

It seemeth that this word hotch-pot, is in English a pudding, for in this pudding is not commonly put one thing alone, but one thing with other things put together. — *Littleton*, § 267, 176 a.

In the Western Law Magazine for August, Mr. Corry continues his Review of the Decisions of the supreme court of Ohio, in bank, and loses none of his severity as he advances. He begins by the remark, that "the present Ch. Judge of Ohio is scarcely behind the last in his opinions on deeds, but in another respect. The late Chief was great on attestations and acknowledgments by parties not under disability, as adult males, officers of the law, sheriffs, &c. The present Chief shines exceedingly with regard to the attestations and acknowledgments of married women, who are peculiarly protected by the law in their conveyance of real estate." He concludes by the following statement: "Indeed, it cannot be otherwise than that a judge, without control, and in the present state of the profession, should be altogether inferior in every respect; that his perceptions should be indistinct, his statements imperfect, and his reasoning on every subject always logically defunct in the very delivery."

The New Orleans Delta states that the supreme court of that state have made a decision in relation to notarial duties, which will have a very important bearing on the interests of the commercial members of the community. It has hitherto been the practice, on the nonpayment of a bill of exchange, or promissory note, for the notary to send a clerk to the acceptor, drawer, and indorsers, and then to make the requisite certificates. The decision made by the supreme court of Louisiana is, that the notary cannot certify to anything that he does not know of his own knowledge; and as it is fairly presumable that the great majority, if not all of the protested notes have been hitherto presented, and the demands made by clerks, this decision will, probably, affect property to a very large amount.

The Boston Whig, in reporting the case of *Meads* v. *Cushing*, — which was an action in the court of common pleas for an assault and battery, and for injuries done to the plaintiff's house — says, "the question, so much discussed of late, concerning *exemplary damages* was incidentally referred to. Cushing J. ruled that the plaintiff was entitled to *entire compensation*, but that vindictive damages were out of the question. No punishment can be inflicted on the defendant in an action of this nature except such as may *incidentally* arise from compelling him to *compensate* the plaintiff for the injury done her."

Judge Storrs has formally tendered his resignation as Professor of Law in Yale College, which has been accepted. His Excellency Governor Bissell and Henry Dunton, Esq., of Bridgeport, have been elected to fill the chairs made vacant by the resignation of Judge Storrs and the death of Isaac H. Townsend, Esq. It has been decided by the corporation, at their present session, to have some annual public exercises connected with the law school — a law commencement.

In the case of the *State* v. *Burns and others*, in the superior court of New Hampshire, for a violation of the license law, the indictment alleged that the defendants not being a licensed taverner (in the singular) sold, &c. It was objected that the indictment was bad, inasmuch as it did not deny that the defendants were licensed taverners (in the plural). The court overruled the objection and sustained the indictment.

The Pennsylvania Law Journal gives the following curious return to a writ of fi. fa. made by the sheriff of one of the interior counties of Pennsylvania, in 1835: "Dere is no gutz to be found in my Bellywack."

Obituary Notices.

Died, in Salem, Massachusetts, July 30th, Benjamin Merrill, LL. D., counsellor at law, aged 63. He was a native of Conway, N. H. and received his education at the Exeter Academy and Harvard University, where he graduated in 1804, with distinguished honor. At Cambridge, he was distinguished for his scholarship, and won the affectionate regard of his classmates. His pecuniary resources being very limited, he employed his leisure in term time and vacation in writing for the clerk of the court and the register of probate. And the knowledge he thus acquired was an admirable introduction and qualification for his after distinction as a conveyancer. On leaving college, Mr. Merrill studied law with Hon. Mr. Stedman, of Lancaster, (Worcester County) and in that county was admitted to the bar.— He commenced the practice of law in Lynn, and was there some six months, but the rules of the bar of Essex county requiring every lawyer to study one year within the county, he gave up his office in ready compliance with this bar rule, and renewed in the office of Judge Putnam, in this city, his duties as a student; and after finishing his term of studies was admitted to the bar of this county, and became and continued the legal partner of Judge Putnam, until the latter was appointed a judge of the supreme judicial court.

Mr. Merrill, in his professional course, has been eminently successful and no less eminently useful. He very seldom attempted to argue cases, but his distinguished ability, thorough learning, and perfect fidelity, secured him the confidence of every one; and no one in this county was so much consulted, or was so often called upon to draft deeds, and conveyances of all descriptions. There probably never lived a conveyancer more capable of condensing in small compass, all the legal essentials of any instrument, and his legal writings are used as models for their brevity and correctness. He was no less distinguished for his miscellaneous than for his legal learning. Possessed of an iron memory, he was the highest authority for persons, places, and events. No one disputed his dates or facts. He received the degree of LL. D. from Harvard University in 1845.

Mr. Merrill was attacked by apoplexy, in his room, at about 7 o'clock, on Saturday evening, and lay undiscoved until 3 P. M., on Monday. He probably was insensible. He was not in the habit of communicating to any one his movements, and often went out of town without giving any one notice. His friends all supposed him absent from town, and his discovery at last was a mere accident. A *post mortem* examination revealed a considerable ossification of the brain, and disclosed the fact that the immediate cause of his illness was the rupture of a blood-vessel in the head.

After the death of Mr. Merrill, a meeting of the bar was held at Salem, at which appropriate resolutions were adopted. Among them was the following:—*Resolved*, That while we lament the loss of a valued member of our profession, we also sympathize with the public in the death of a citizen whose blameless life, pure and simple manners, kind and affectionate disposition, and disinterested devotion to all liberal and honorable institutions and pursuits through life, have made him one of our most useful and honored townsmen, and secured him the confidence and attachment of the whole community.

In Tiverton, R. I., July 26, Hon. Job Durfee, chief justice of Rhode Island, aged 56. He was a representative in congress from 1821 to 1823. Few men were so familiar with the early history of the state, and very few were so deeply imbued with the principles of its founders. His historical labors are among the most valuable of his life. His honesty of purpose and integrity of character were never questioned. The Providence Journal says, "he was aware of the change which awaited him, and his last words were, 'I have endeavored through life to do what I thought to be right; and I am ready to die.'"

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Occupation.	Commencement of Proceedings.	Name of Master or Judge.
Barnes & Covill,	Lowell,	Traders,	July 12,	Josiah G. Abbott.
Belcher, Jonathan W.	Randolph,	Boot Manufacturer,	" 26,	Sherman Leland.
Berry, Daniel,	Danvers,	Provision Dealer,	" 24,	John G. King.
Berry, Richard N. et al.	Salem,	Merchants,	" 19,	Bradford Sumner.
Bryden, Addison,	Dedham,	Cabinet Maker,	" 10,	Sherman Leland.
Bills, Jesse,	Roxbury,	Teamster,	" 26,	Sherman Leland.
Bradbury, Cotton C.	Boston,	Printer,	" 30,	Bradford Sumner.
Bradley, John M.	New Bedford,	Trader,	May 31,	J. H. W. Page.
Buell, Jared,	Rochester,	Housewright,	July 10,	William Thomas.
Button, W. B. et al.	Boston,	Merchants,	" 17,	Bradford Sumner.
Cahoon, Reuben,	Marblehead,	Housewright,	" 21,	John G. King.
Canfield, William,	New Bedford,	Trader,	" 13,	Oliver Prescott.
Carnes, John,	Boston,	Trader,	" 8,	Bradford Sumner.
Carter, Nelson,	Boston,	Teamster,	" 1,	Bradford Sumner.
Caswell, Mason C.	Roxbury,	Trader,	" 5,	Sherman Leland.
Clement, Moses et al.	Lawrence,	Housewright,	" 28,	John G. King.
Codding, William W.	Worcester,	Laborer,	" 30,	Chas. W. Hartshorn.
Haraden, L. S.	Boston,	Clerk,	" 19,	Bradford Sumner.
Harwood, Elbridge G.	Medway,	Laborer,	" 7,	D. A. Simmons.
Hawkes, Ezra, Jr.	Boston,	Tin Plate Worker,	" 12,	Bradford Sumner.
Hayes, Edwin E.	Belchertown,	Wagon Maker,	" 24,	Mark Doolittle.
Haynes, Sumner S.	Boston,	Locksmith,	" 9,	Bradford Sumner.
Hewins, James M. et al.	Boston,	Merchants,	" 20,	Bradford Sumner.
Hobbs, John,	N. Chelsea,	Brickmaker,	" 13,	Bradford Sumner.
Holman, Dexter,	Worcester,	Painter,	" 15,	Chas. W. Hartshorn.
Hunt, Alexander,	Lowell,	Machinist,	" 17,	Josiah G. Abbott.
Hunting, Enoch,	Boston,	Musical Inst'nt Ma-	" 26,	Bradford Sumner.
Mason, William H.	Boston,	Housewright, [ker,	" 23,	Bradford Sumner.
McAsker, Owen,	Lowell,	Trader,	Aug. 4,	Josiah G. Abbott.
McCarthy, Michael,	Salem,	Shoemaker,	July 16,	John G. King.
McKnight, Elijah,	Worcester,	Carpenter,	" 8,	Isaac Davis.
McNamara, John,	Brookline,	Mason,	" 1,	D. A. Simmons.
McQuestim, Joseph W.	Boston,	Hackman,	" 7,	Bradford Sumner
Merriam, S. S.	Boston,	Machinist,	" 8,	Bradford Sumner.
Miles, Samuel S.	Boston,	Clerk,	" 24,	Bradford Sumner.
Mills, Rufus A.	Dedham,	Machinist & Trader,	" 1,	Sherman Leland.
Moore, T. M.	Boston,	Trader,	" 30,	Ellis Gray Loring.
Morey, Wm. C. et al.	Boston,	Merchants,	" 17,	Bradford Sumner.
Morse, Elijah,	Boston,	Trader,	" 22,	Bradford Sumner.
Paul, William et al.	Roxbury,	Carpenters,	" 26,	David A. Simmons.
Pearson, John S.	Newburyport,	Merchant,	" 19,	David Roberts.
Perkins, Thomas S.	Plymouth,	Cooper,	" 10,	William Thomas.
Pierce, Charles,	S. Reading,	Cordwainer,	" 6,	George W. Warren.
Phinney, Ralph,	New Bedford,	Manufact'r of Oars,	" 1,	John H. W. Page.
Ray, Benjamin et al.	Nantucket,	Painters,	" 20,	Charles Bunker.
Ray, Mark W.	Lowell,	Tailor,	" 19,	Josiah G. Abbott.
Reynolds, Moses C.	Salem,	Trader,	" 13,	John G. King.
Richardson, Charles B.	Attleborough,	Manuf'er of Jewelry,	" 17,	Charles J. Holmes.
Robinson, R. and W. et al.	Attleborough,	Manufacturers,	June 14,	Charles J. Holmes.
Sargent, Charles H.	Andover,	Trader,	July 2,	James H. Duncan.
Snow, Joseph W.	Marblehead,	Trader,	" 27,	John G. King.
Thayer, George A. et al.	Boston,	Merchants,	" 20,	Bradford Sumner.
Thing, Joseph,	Boston,	Contractor,	" 5,	Ellis Gray Loring.
Thompson, Edward S.	Charlestown,	Chair Dealer,	" 21,	George W. Warren.
Tolman, Samuel P.	Boston,	Plasterer,	" 7,	Bradford Sumner.
Towle, Hiram K.	Boston,	Builder,	" 6,	Bradford Sumner.
Walker, Milton C.	Boston,	Trunk Maker,	" 2,	Bradford Sumner.
Watson, Albert,	Boston,	Vict'ing-house Keep-	" 7,	Bradford Sumner.
Webber, William,	Roxbury,	Trader, [er,	" 5,	Sherman Leland.
Whiting, Zenas,	Quincy,	Blacksmith,	" 1,	Sherman Leland.
Williams, Alpheus,	Sutton,	Laborer,	" 6,	Isaac Davis.
Williams, Joseph H.	Boston,	Shipwright,	" 6,	Bradford Sumner.
Wilson, Thomas et al.	Roxbury,	Carpenter,	" 26,	D. A. Simmons.
Young, Agnes,	Boston,	Widow,	" 16,	Bradford Sumner.